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AUG 15 1953
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IN THE

Supreme Court of the United States

No. 263 October Term, 1953

JAMES F. MARONEY, Successor to J. W. CLAUDY, Warden, Western State Penitentiary,
PETITIONER,

v.

UNITED STATES OF AMERICA, *ex rel.* DAVID DARCY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

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IN THE

Supreme Court of the United States

No. ..... October Term, 1953.

JAMES F. MARONEY, Successor to J. W. CLAUDY, Warden, Western State Penitentiary,
PETITIONER,

v.

UNITED STATES OF AMERICA, *ex rel.* DAVID DARCY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Attorney General of Pennsylvania, on behalf of James F. Maroney, Acting Warden, Western State Penitentiary, prays that a Writ of Certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

Opinions and Orders Below.

1. The opinion of the Court of Oyer and Terminer of Bucks County, Pennsylvania (App'x. 101-117) is not reported.

2. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence, is reported at 362 Pa. 259, 66 A. 2d 663.

3. The order of the Supreme Court of Pennsylvania dismissing the petition for a Writ of Habeas Corpus is not reported.

4. The orders of this Court denying petitions for Writ of Certiorari are reported at 338 U. S. 862.

5. The order of the Supreme Court of Pennsylvania dismissing a petition for a Writ of Certiorari and reargument is not reported.

6. The opinion of the Supreme Court of Pennsylvania dismissing a petition for a Writ of Habeas Corpus is reported at 367 Pa. 130, 79 A. 2d 785.

7. The order of this Court denying a petition for a Writ of Certiorari is reported at 342 U. S. 837.

8. The opinion of the District Court is reported at 97 F. Supp. 930.

9. The opinion of the Circuit Court of Appeals is reported at 204 F. 2d 407.

10. The order of the Circuit Court of Appeals denying a rehearing is not reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 24, 1953. On April 8, 1953, pursuant to Rule 33 of the Circuit Court of Appeals, a petition for rehearing was filed. On April 29, 1953, a rehearing was denied. On July 27, 1953, Mr. Chief Justice Vinson granted the petitioner an extension of time, to August 15, 1953, in which to file a Petition for a Writ of Certiorari.

Questions Presented.

1. Whether a habeas corpus proceeding instituted by a person in custody pursuant to a State criminal judgment on the ground that the judgment is constitutionally void under the Fourteenth Amendment of the Federal Constitution is a suit against the State to which the judicial power of the courts of the United States not possessing direct appellate jurisdiction over State courts does not extend where the State has not consented to the suit, either expressly or impliedly by failure to provide corrective judicial process.

2. Whether the District Court abused its discretion in refusing a plenary hearing on the allegation that respondent was tried in an atmosphere of hysteria and prejudice where (a) no pre-trial application was made for a continuance or a change of venue; (b) only 7 of 20 peremptory challenges were used; (c) sweeping and searching *voir dire* examinations of the selected jurors disclosed no personal prejudice against the respondent or previously formed opinions; (d) no complaint was made in a post verdict motion for a new trial or the appellate or first collateral habeas corpus proceeding; and (e) post verdict statements secured by the respondent from the trial jury clearly manifested an attitude of impartiality.

3. Whether the District Court may inquire into issues which have been waived in the State courts through failure to raise them in the appropriate manner?

4. Whether the qualification of members of a trial jury may be inquired into on habeas corpus?

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STAES

Amendment XI

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

FEDERAL STATUTES

Section 2241, The Revised Judicial Code, 28 U. S. C. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *"

STATUTES OF PENNSYLVANIA

Section 1—Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 551.

"In criminal prosecutions the venue may be changed, on application of the defendant or defendants, in the following cases:

"First. When the judge, who by law is required to try the same, as a near relative of the prosecutor, or of the defendant, or of the person injured, or has knowledge of facts which make it necessary that he should be a witness in the case.

"Second. When, upon the application of a defendant in a felony, it is made to appear to the satisfaction of the court that, from undue excitement against the prisoner, in the county where the offense was committed, a fair trial cannot be had, or that there exists in that county so great a prejudice against him that he cannot obtain a fair trial, or that there is a combination against him, instigated by influential persons, by reason of which he cannot obtain a fair trial.

"Third. When, upon the trial of any criminal case, an unsuccessful effort has been made to procure and impanel a jury for the trial of the defendant, and it shall be made to appear to the court by the written affidavit of some credible witness that a fair trial cannot be had.

"Fourth. When, upon second trial of any felonious homicide, the evidence on the former trial thereof shall have been published within the county in which the same is being tried, and the regular panel of jurors shall be exhausted without obtaining a jury."

Section 2, Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 552:

"All applications for changes of venue shall be made to the court in which the indictment shall be pending, in such manner as the said court shall direct, and before the jury shall be sworn therein; and if the said court shall be satisfied of the propriety of such change of venue, and that the causes assigned therefor are true, and are within the provisions of the first section

of this act, it shall be ordered that the venue thereof shall be changed to some adjoining or convenient county where the causes alleged for a change do not exist."

Section 206(a), Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 66(a):

Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the powers and perform the duties by law vested in and imposed upon the department.

(a) The following officers shall be the heads of the administrative departments following their respective titles:

* * * * *

Attorney General, of the Department of Justice;

* * * * *

Section 704—Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated, Section 244.

"The Attorney General shall be the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth.

"He shall exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this Commonwealth."

Section 903 (b)—Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated, Section 293.

"The Department of Justice shall have the power, and its duty shall be:

* * * * *

"(b) To represent the Commonwealth, or any department, board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead."

Statement.

The respondent was jointly indicted with Harold Foster, Harry Zeitz and Felix Capone, in the Court of Oyer and Terminer of Bucks County, Pennsylvania, for murder growing out of an armed robbery. Capone pleaded guilty. Respondent requested and was granted a severence.

Foster and Zeitz were tried before a jury presided over by Judge Calvin S. Boyer. The jury returned a verdict of first degree murder, and, in the exercise of their discretion, as authorized by Section 701 of The Penal Code of 1939, 18 Purdon's Penna. Statutes Annotated, Section 4701, fixed the penalty at death. The judgment and sentence were affirmed, opinion reported at 364 Pa. 294, 72 A. 2d 282.

The respondent's case was called for trial on Monday, June 7, 1948, the week following the completion of the trial of Foster and Zeitz, before Judge Hiram Keller, President Judge of the Bucks County Court.

Respondent was represented by counsel of 30 years' experience at the Bar, who has been engaged by his aunt on the recommendation of Thomas D. McBride, a leading member of the Philadelphia Bar (Bucks County is contiguous with Philadelphia County), and who subsequently argued the direct appeal before the Supreme Court of Pennsylvania, and was of counsel in the certiorari proceedings in this Court following the affirmance and denial of a writ of habeas corpus by that Court.

There was no application for a continuance or a change of venue.

An entirely new panel of 120 jurors had been summoned for service during that week, 39 of whom were excused for various reasons, leaving a panel of 81 members. The panel

was segregated in the Grand Jury room and called individually for the *voir dire* examinations.

Eight jurors[1] were selected on Monday, June 7, 1948. These jurors were placed under the supervision of court attaches and cautioned to not discuss the case with anyone or among themselves. The following day, Tuesday, June 8, 1948, the remaining 4[2] and 2 alternates[3] were selected. The respondent exercised only 7 of 20 statutorily authorized peremptory challenges. The *voir dire* examinations were most sweeping and searching. All of the persons selected said that they would decide the issue upon the law and the evidence.

The trial lasted several days, during all of which the jury was under the continual supervision of experienced court functionaries.

The trial judge, in his charge, instructed the jury that they were "the sole judges of the questions of fact involved in this case" and they "*must ascertain those facts exclusively from the evidence that was submitted at the trial, not from anything you may have heard or read from sources other than the testimony of witnesses at this trial*" (App'x 66).

Following the verdict, a timely motion for a new trial was made on the sole ground of error in the admission of evidence of prior crimes. Notwithstanding that it might have been presented to the trial court, even at that time,[4]

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[1] *W. D. Pardoe* (App'x. 3-6); *Anna W. Bucher* (App'x. 6-11); *Marvin D. Weidner* (App'x. 12-15); *Jesse H. Horne* (App'x. 15-20); *Oliver C. Landis* (App'x. 21-25); *Franklin T. Fretz* (App'x. 25-29); *Roger Mason* (App'x. 29-35) and *Howard Price* (App'x. 36-39).

[2] *L. Calvin Fluck* (App'x. 40-43); *Elva A. Shive*, (App'x. 44-48); *Ruth G. Bliss* (App'x. 48-51); *Ann L. Reed* (App'x. 51-56).

[3] *William F. Hickey* (App'x. 56-59); *Virginia Brillman* (App'x. 59-61).

[4] *Commonwealth v. Deni*, 317 Pa. 289, 293, 176 Atl. 919; *Commonwealth v. Harrison*, 137 Pa. Superior Ct. 279, 284-285; 8 A. 2d 733; *Commonwealth v. Spallone*, 154 Pa. Superior Ct. 282, 286, 35 A. 2d 727; *Commonwealth v. Balles*, 160 Pa. Super. Ct. 148, 150-151, 50 A. 2d 729.

not a word was said about hysteria and prejudice preventing the impanelling of a fair and impartial jury. Neither was it mentioned on the direct appeal to the Supreme Court of Pennsylvania[5] where respondent was not only represented by trial counsel, but also two other very capable attorneys,[6] in the first habeas corpus proceeding, nor to this Court in the first certiorari proceeding.

Indeed, it was not mentioned to any court, until it became evident, after several fruitless applications for executive clemency, the verdict of the jury and judgment of society would be executed, that it was then, for the first time, mentioned to the Supreme Court of Pennsylvania in an application for certiorari and reargument following the refusal of which the present proceeding was then instituted in the District Court.

The matter was argued before a "two judge" District Court who, following a dismissal of an identical petition by the Supreme Court of Pennsylvania, opinion reported at 367 Pa. 130, 79 A. 785, dismissed the application on the basis of the trial record and prior proceedings and refused a certificate of probable cause for appeal.

Circuit Judge Maris allowed an appeal to the court below.

The matter was first argued on January 7, 1952 before a "three judge" division composed of Biggs, Chief Judge, Kalodner, Circuit Judge, and Burns, District Judge.

It was reargued on December 1, 1952, nearly eleven months later, before the Court of Appeals *en banc*.

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[5] The Supreme Court of Pennsylvania has been prone to rectify an error which justice requires rectified. *Schoeppe v. Commonwealth*, 65 Pa. 51, 57; *Commonwealth v. Brown*, 309 Pa. 515, 523, 164 Atl. 726; *Commonwealth v. Ragone*, 317 Pa. 113, 126-128, 176 Atl. 454. *Delco Co. v. Frick*, 318 Pa. 337, 345, 178 Atl. 135; *Commonwealth v. Kurus*, 371 Pa. 633, 635, 92 A. 2d 196.

[6] *Commonwealth ex rel. Darcy v. Claudy*, 367 Pa. 130, 133, 79 A. 2d 785, cert. den. 342 U. S. 837.

The majority (Biggs, C. J., McLaughlin, Kalodner and Hastie, JJ.) held that the allegation of local prejudice preventing the empanelling of a fair and impartial jury was not, as the District Court concluded, refuted by the record in the prior proceedings, and reversed for a full hearing on that issue.

The minority (Maris, Goodrich and Staley, JJ.) held that the District Court had properly dismissed the petition.

A petition for rehearing was timely filed pursuant to Rule 33 of the Court of Appeals. Rehearing was denied on April 29, 1953.

This Court, on July 27, 1953, by Mr. Chief Justice Vinson, granted the Petitioner an extension of time, to August 15, 1953, in which to file a petition for a Writ of Certiorari to the Court of Appeals.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In granting a certificate of probable cause for appeal.

2. In failing to dismiss the appeal for want of jurisdiction.

3. In reversing and remanding for a plenary hearing.

Reasons for Granting the Writ.

1. In Pennsylvania, at least, it has become a common and general practice for persons under a sentence of death for murder—the only capital crime in Pennsylvania—after all other avenues, executive as well as judicial, have failed to result in deliverance from the sentence, to seek relief from the Federal District Courts on practically every conceivable ground which the ingenuity of the human mind is capable of devising.

Judges, defense lawyers, prosecuting attorneys and trial jurors have all been put on trial in these proceedings.

Delay—in this case over two years—not only invites caustic criticism of the legal system but also results in a substantial stultification of a primary objective of capital punishment—deterrence.

Unseemly conflicts between the Federal and State judicial systems have been engendered.

It is a serious matter and one of grave concern to Pennsylvania whether, after providing corrective judicial process whereby rights secured by the Federal and State Constitutions, as well as the common law, may be adequately protected, it is compelled, against its consent, to submit to an inquiry by Federal Courts, not possessing direct appellate revisory jurisdiction over State Courts, into the Federal Constitutional validity of criminal judgments rendered in their courts of record, frequently affirmed by appellate courts and left undisturbed by this Court on appropriate application. Unquestionably, the other 47 states of the Nation are similarly concerned.

This issue has never been squarely adjudicated by this Court. The cogent reasons, above mentioned, make a square determination of it imperative.

2. The decision of the court below is in conflict with the recent decision of the Court of Appeals for the Second Circuit in *United States v. Rosenberg, et al.*[7]

3. The decision of the court below is in conflict with the recent decision of this Court in *Brown v. Allen.*[8]

4. The decision of the court below is in conflict with the decision of this Court in *In Re Schneider.*[9]

[7] 200 F. 2d 666, cert. den. 345 U. S. 965, reh. den. 345 U. S. 1003.
[8] 344 U. S. 433.
[9] 148 U. S. 162.

ARGUMENT.

POINT I.

The proceeding is a suit against the State of Pennsylvania to which the judicial power of United States Courts not possessing direct appellate revisory jurisdiction over State courts does not extend since the State has not either expressly or impliedly consented to it.

This Court decided in *Hans v. Louisiana*[10] and *North Carolina v. Temple*[11] that the spirit of the Eleventh Amendment extends to suits against a state by a resident thereof.[12]

Should the doctrine of those authorities be applied to this proceeding?

The petitioner submits that the answer to that inquiry is yes.[13]

FIRST. Is a habeas corpus proceeding a suit? This Court has so held on many occasions,[14] and, properly so, under the classic definition of that term by Mr. Chief Justice Marshall in *Cohens v. Virginia*,[15] since the avowed pur-

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[10] 134 U. S. 1.

[11] 134 U. S. 22.

[12] See cases cited, footnotes 38 and 39, *post*.

[13] "* * * *It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court.* * * *": *Darr v. Burford*, 339 U. S. 200, 217.

[14] *Darr v. Burford*, 339 U. S. 200, 207; *Ex Parte Quirin*, 317 U. S. 1, 24; *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 564, 567, 597; *Bryant v. Zimmerman*, 278 U. S. 63, 70; *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 112.

[15] "What is a suit? We understand it to be the prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur.*" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

Footnote continued on following page

pose is to enforce a right secured by the Fourteenth Amendment of the Federal Constitution.

SECOND. Is the Eleventh Amendment "confined" to actions for money judgments? If it is, then the doctrine of *Hans v. Louisiana*[16] and *North Carolina v. Temple*[17] would be inapplicable. In *Missouri v. Fiske*,[18] however, it was held that the Eleventh Amendment was **not** confined to money judgments. The doctrine of those cases, therefore, is not inapplicable to this proceeding on that score.

THIRD. Is the proceeding **by** the respondent, or **by** the United States?

If the latter, then, concededly the entire argument falls.[19]

At the common law, while a judicial inquiry upon habeas corpus was predicated upon the theory that the Crown had "a right to inquire into the causes for which any of the subjects are deprived of their liberty",[20] it was evidently

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Footnote continued from preceding page

"To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. * * *": *Cohens v. Virginia*, 6 Wheat. 264, 407-408.

See also, *Missouri v. Fiske*, 290 U. S. 18, 26.

[16] 134 U. S. 1.

[17] 134 U. S. 22.

[18] "* * * The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, *were not so limited*. Expressly applying to *suits* in *equity as well as at law*, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. * * *": *Missouri v. Fiske*, 290 U. S. 18, 27. Cf., Worcester County Trust Co. v. Riley, 302 U. S. 292.

[19] *United States v. Texas*, 143 U. S. 621;
Case v. Bowles, 327 U. S. 192;
United States v. California, 297 U. S. 175;
United States v. Utah, 283 U. S. 164.

[20] 3 Blackstone's Commentaries 331; 10 Opinions of the Attorney General of the United States, 74, 88; 9 Halsbury's Laws of England, 2 Ed. pp. 701-702.

not regarded as an action **by** the Crown, but **against** the Crown. This is clearly manifest by *Darnell's Case,*[21] in the Court of King's Bench, three and one quarter centuries ago, in which the Attorney General of England appeared and opposed the application for a writ of habeas corpus for deliverance from custody pursuant to a warrant issued on the order of the Crown.

If it were, in fact, an inquiry **by** the Crown, why, then, did not the Attorney General appear for the applicant Darnell? The answer is clear—it was regarded as an action **by** the individual detained and **against** the Crown.

The same treatment appears to have been accorded such a proceeding in our Federal legal system. For instance, in *United States v. Hamilton,*[22] the very first reported application to this Court for a writ of habeas corpus, the application was resisted by a representative of the Attorney General of the United States.

In the next reported application to this Court, *Ex Parte Bollman* and *Swarthout,*[23] while the Attorney General of the United States declined an opportunity to argue on behalf of the United States, evidently his appearance had been entered and he was present at the application.

In the cases of *Ex Parte Watkins,*[24] *Ex Parte Milligan,*[25] *Ex Parte Yerger,*[26] *Ex Parte Quirin,*[27] and *In Re Yamashita,*[28] all of which were applications to this Court for a writ of habeas corpus, the applications were opposed by the Attorney General of the United States.

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[21] 3 State Trials 1.
[22] 3 Dallas 17 (1795).
[23] 8 U. S. (4 Cr.) 75.
[24] 32 U. S. (7 Pet.) 568.
[25] 71 U. S. (4 Wall.) 2
[26] 75 U. S. (8 Wall.) 85.
[27] 317 U. S. 1.
[28] 327 U. S. 1.

Indeed, the Attorney General of the United States opposed the recent application of Julius and Ethel Rosenberg to this Court at the June 15th Special Term, 1953,[29] for a writ of habeas corpus.

It is obvious that a habeas corpus proceeding is not a suit **by** the United States, at least as far as federal prisoners are concerned, but a suit **against** the United States.[30] Were it not an action **against** the United States, surely the Attorney General of the United States would not have **opposed** the applications. Moreover, if it were an action **by** the United States, it would be the duty of the Attorney General to supervise and the United States attorney[31] to prosecute the application on behalf of the applicant. No one would be so bold as to make such a suggestion.

There is no essential distinction between a habeas corpus proceeding by a federal prisoner and a state prisoner which would justify a difference in result. The proceeding is **by** the individual applicant and not **by** the United States.

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[29] .... U. S. ...., 73 S. Ct. 1152; cf., *Burns v. Wilson*, 346 U. S. 137.

[30] See Longsdorf, Federal Habeas Corpus Acts, 13 F. R. D. 407, 410.

"* * * When the counsel for Milligan presented to the court the petition for the writ of habeas corpus, Mr. Hanna, the district attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this—that he was informed of the application, and appeared *on behalf of the government to contest it*. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought in the only way he could, to *recover his liberty*. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He *very properly* appeared, * * *": *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 114.

[31] "(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned;

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties." Section 507, Revised Judicial Code, 28 U. S. C. 507.

FOURTH. Is the proceeding against the State? The resistance of the application in *Darnell's Case* by the Attorney General of England, and identical action by the Attorney General of the United States in the several cases cited, clearly demonstrate that it is a proceeding **against** the sovereign—federal or state. Indeed, this Court has said that the State is the real party in interest in a habeas corpus proceeding involving a State criminal judgment.[32] Section 2252 of the Revised Judicial Code[33] is itself demonstrative of that conclusion.

Analytically, that conclusion is compelling. The proceeding is a "collateral attack on the judgment forming the basis of detention."[34] The judgment was rendered in an action by and in the name of the State[35] and against the respondent for a public wrong.[36] If the proceeding results in the nullification of the judgment, it is the State—not the custodian—who is adversely affected. The custodian has no personal interest in the judgment for he has no liability for official action in reliance on it.[37] The result is just as effective compulsion against the State as a money

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[32] *Knewel v. Egan*, 268 U. S. 442, 448; cf. *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 114; *Collins v. Miller*, 252 U. S. 364, 371; *Ornelas v. Ruiz*, 161 U. S. 502, 507; *Harkrader v. Wadley*, 172 U. S. 148, 162.

[33] "Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

[34] *Goto v. Lane*, 265 U. S. 393, 401; *Frank v. Mangum*, 237 U. S. 309, 331.

[35] "* * * All prosecutions shall be carried on *in the name and by the authority of the Commonwealth of Pennsylvania* and conclude 'against the peace and dignity of the same'." Article 5, Section 23, Constitution of Pennsylvania (Emphasis supplied).

See also *Harger v. Thomas*, 44 Pa. 128, 130; *Commonwealth v. Neuman*, 151 Pa. Superior Ct. 642, 649, 30 A. 2d 698; *Commonwealth v. Shimpeno*, 160 Pa. Superior Ct. 104, 114; 50 A. 2d 39.

[36] *Commonwealth v. Shimpeno, ibid.* 1 Bl. Comm., p. 268; 4 Bl. Comm., p. 2.

[37] 1 East, Pleas of the Crown 334; *Thompson v. Lyle*, 3 W. & S. (Pa.) 166; Cf., *Erskine v. Hohnbach*, 81 U. S. (14 Wall.) 613; *Haffin v. Mason*, 82 U. S. (15 Wall.) 671, 675; *Taylor v. McGrath*, D. C. Cir., 194 F. 2d 883; *Laughlin v. Rosenman*, D. C. Cir., 163 F. 2d 838.

judgment[38] or the specific enforcement of a contract.[39] Indeed, in substance, it is specific enforcement of a right against the State. By necessity, the proceeding is fundamentally and essentially **against** the State.[40]

FIFTH. Has Pennsylvania **expressly** consented to this proceeding? At the threshold, the first pertinent inquiry is whether Section 5[41] of the Fourteenth Amendment **may be regarded** as consent.

This Court has held that the "right of individuals to sue a State in * * * a federal * * * Court, cannot be derived from the Constitution or laws of the United States.[42]

In the Civil Rights Cases,[43] it was held that the Tenth Amendment[44] was restrictive of Section 5 of the Fourteenth Amendment.

The language of this Court and apparently the facts in *Palmer v. Ohio*,[45] indicate that the Eleventh Amendment is restrictive of Section 5 of the Fourteenth Amendment. In-

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[38] Ford Co. v. Dep't. of Treasury, 323 U. S. 459;
Kennecott Copper Corp. v. Tax Comm'n, 327 U. S. 573;
Great Northern Ins. Co. v. Read, 322 U. S. 47;
Smith v. Reeves, 178 U. S. 436.

[39] Hans v. Louisiana, 134 U. S. 1;
North Carolina v. Temple, 134 U. S. 22;
In re Ayers, 123 U. S. 443;
Louisiana v. Jumel, 107 U. S. 711;
Antoni v. Greenhow, 107 U S. 769;
Cunningham v. Macon & Brunswick Railroad, 109 U. S. 446;
Hagood v. Southern, 117 U. S. 52;
Fitts v. McGhee, 172 U. S. 516.

[40] See Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278, 285; Tindal v. Wesley, 167 U. S. 204, 223.

[41] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 5, Amendment XIV, Constitution of the United States.

[42] *Palmer v. Ohio*, 248 U. S. 32, 34; *Duhne v. New Jersey*, 251 U. S. 311; *Missouri v. Fiske*, 290 U. S. 18, 26.

[43] 109 U. S. 3; See also, *Collins v. Hardyman*, 341 U. S. 651, 659.

[44] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X, Constitution of the United States.

[45] 248 U. S. 32.

deed, that was the implied holding of this Court in several cases[46] arising under the Fourteenth Amendment, in which the jurisdiction of inferior United States courts was justified on the ground that actions were **not** suits against the State, but **against State officers**, in their individual capacity. Otherwise, it was totally unnecessary for the Court to resort to that reasoning.

Both the pre-Fourteenth Amendment scope of habeas corpus and the express denial of authority to inferior Federal courts to indirectly interfere with State criminal judgments for over three-quarters of a century negatives even a momentary thought that the ratifying states were consenting to the exercise of indirect revisory powers by courts not possessing direct revisory power.

SIXTH. Has Pennsylvania impliedly consented to suit by failing in its constitutional duty[47] to provide corrective judicial process?

The answer to this inquiry is no.

Over three-quarters of a century ago, Pennsylvania statutorily authorized courts in which felony indictments are pending to grant a change of venue when it appears "to the satisfaction of the Court, that from undue excitement against the prisoner, in the county where the offense

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[46] *Reagen v. Farmers' Loan & Trust Co.*, 154 U. S. 362;
Smyth v. Ames, 169 U. S. 466;
Fitts v. McGhee, 172 U. S. 516;
Prout v. Starr, 188 U. S. 537;
Ex Parte Young, 209 U. S 123;
Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278;
Truax v. Raich, 239 U. S. 33;
Green v. Louisville & I. R. Co., 244 U. S. 499;
Public Service Co. v. Corby, 250 U. S. 153;
Sterling v. Constantin, 287 U. S. 378;
Western Union Tel. Co. v. Andrews, 216 U. S. 165;
Herndon v. Chicago R. I. & P. Co., 218 U. S. 135;
Ligett Co. v. Baldridge, 278 U. S. 105.

[47] *Mooney v. Holohan*, 294 U. S. 103; *Moore v. Dempsey*, 261 U. S. 86; *Foster v. Illinois*, 332 U. S. 134, 139; *Hedgebeth v. North Carolina*, 334 U. S. 806, 807; *Jennings v. Illinois*, 342 U. S. 104, 111.

was committed, a fair trial cannot be had, or that there exists in that county so great a prejudice against him that he cannot obtain a fair trial * * * ".[48]

The action of the trial court is subject to review.[49] Moreover, the Supreme Court of Pennsylvania has the power to remove the indictment, upon application, and transfer it to another county for trial.[50]

The same issue may also be raised on a motion for a continuance or for a new trial, and the court's action thereon is subject to review.[51]

How can it possibly be said that corrective judicial process was not available to the respondent for the vindication of rights of which he now claims to have been deprived.[52]

Pennsylvania has not, therefore, impliedly consented to this proceeding as a result of any failure to provide adequate corrective judicial process.

SEVENTH. Did the appearance of the Attorney General of Pennsylvania and the District Attorney of Bucks County operate as a waiver of the State's immunity to suit? The answer to this question depends upon whether or not the State has consented to suit.[53]

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[48] Sections 1 (Second) and 2, Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated 551 (Second) and 552.

[49] *Commonwealth v. Karmendi*, 328 Pa. 321, 195 Atl. 62;
Commonwealth v. Schurtz, 337 Pa. 405, 409-410, 10 A. 2d 378.

[50] *Commonwealth v. Balph*, 111 Pa. 365, 3 Atl. 220;
Commonwealth v. Delamater, 145 Pa. 210, 22 Atl. 1098;
Commonwealth v. Smith, 185 Pa. 553, 40 Atl. 73;
Commonwealth v. Green, 185 Pa. 641, 40 Atl. 96;
Quay's Petition, 189 Pa. 517, 42 Atl. 199;
Commonwealth v. Ronemus, 205 Pa. 420, 54 Atl. 1095;
Commonwealth v. Reilly, 324 Pa. 558, 188 Atl. 574.

[51] *Commonwealth v. Deni*, 317 Pa. 289, 293, 176 Atl. 919;
Commonwealth v. Harrison, 137 Pa. Superior Ct. 279, 284-285 8 A. 2d 733;
Commonwealth v. Spallone, 154 Pa. Superior Ct. 282, 286, 35 A. 2d 727;
Commonwealth v. Balles, 160 Pa. Superior Ct. 148, 150-151, 50 A. 2d 729.

[52] "So long as the rights under the United States Constitution may be pursued, it is for a state and not for this Court to define the mode by which they may be vindicated": *Carter v. Illinois*, 329 U. S. 173, 176.

[53] *Ford Co. v. Dept. of Treasury*, 323 U. S. 459, 466.

Article I, Section 11 of the Constitution of Pennsylvania provides: "Suits may be brought against the Commonwealth in such manner, *in such courts* and in such cases *as the Legislature may by law direct*[54] (emphasis supplied).

The Attorney General of Pennsylvania is the head of the Department of Justice.[55] He is the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth and is authorized to exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this Commonwealth.[56] In addition, the Attorney General of Pennsylvania "is clothed with the powers and attributes which envelop Attorneys General at common law."[57]

The Department of Justice has the power and duty "To represent the Commonwealth * * * in any litigation to which the Commonwealth * * * may be a party, or in which the Commonwealth * * * is permitted or required by law to intervene or interplead".[58]

This of course, must be construed consonantly with the Constitution (Article I, Section 11) as authorizing the At-

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[54] "Subject to the limitations arising from the federal nature of our government and the provisions of the federal Constitution the Commonwealth of Pennsylvania is a sovereign State, and, as such, it cannot be sued except with its own consent * * * That consent is conditionally provided by Article I, Section 11 of the State Constitution, which says that 'Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.' * * *" *Kaufman Const. Co. v. Holcomb et al.*, 357 Pa. 514, 516, 55 A. 2d 534.

See also, *Collins v. Commonwealth*, 262 Pa. 572, 575, 106 Atl. 229; *Merchants' Warehouse Co. v. Gelder*, 349 Pa. 1, 7, 36 A. 2d 444; *Bell Telephone Co. v. Lewis et al.*, 313 Pa. 374, 375, 169 Atl. 571.

[55] Section 206(a), Act of April 9, 1929, P. L. 177, as amended, 71 Purdon's Penna. Statutes Annotated 66(a).

[56] Section 704 Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 244.

[57] See *Commonwealth ex rel. Minerd v. Margiotti*, 325 Pa. 17, 30-31, 188 Atl. 524.

[58] Section 903, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 293.

torney General to represent the Commonwealth only in such courts and in such cases as the Legislature may by law direct". No general law authorizes the Attorney General to appear in behalf of the Commonwealth in the Courts of the United States. The State, therefore, has not consented to the suit.[59]

Nor do the common law powers of the Attorney General of Pennsylvania alter or modify that conclusion for the reasons that the Attorney General, at common law, did not have the power to waive the sovereign's immunity to suit.[60] Even if the Attorney General, at common law, had such powers, those powers were modified by Article I, Section 11 of the Constitution of Pennsylvania. It is clear that the District Attorney's appearance could not possibly work a different result.

EIGHTH. It is the conviction not only of Pennsylvania, but also several, if not all of the states of the Nation, as well as the State courts of last resort[61] that orderly Federal procedure under our dual system of government demands that the states' highest courts should be subject to reversal only by this Court, and that a state's system for the administration of justice should be condemned as constitutionally inadequate, only by this Court [62]— at least until Congress has conferred direct appellate revisory jurisdiction over State courts upon Federal tribunals inferior to this Court.[63]

The power conferred by Section 2241 of the Revised Judicial Code, 28 U. S. 2241, upon District Judges to in-

[59] *Ford Co. v. Dept. of Treasury*, 323 U. S. 459, 468-469.
[60] This could only be done by the Crown's endorsement of a Petition of Right. *United States v. Lee*, 106 U S. 196, 238.
[61] See footnote 13 to Opinion of Mr. Justice Jackson, concurring, *Brown v. Allen*, 344 U. S. 443, 539.
[62] Cf. *Darr v. Burford*, 339 U. S. 200, 217, footnote 13, *supra*.
[63] The Federalist No. 82; 2 Story on the Constitution (5th Ed.) Sec. 1707.

quire into the constitutional validity of State criminal judgments has, in effect, created, in Pennsylvania alone, 12 "one judge" appellate courts and 35 "3 judge" superior appellate courts[64] with power to make findings of fact and conclusions of local as well as Federal constitutional law, at variance with specific and necessarily implied findings and conclusions of the State court of last resort—a much broader appellate[65] revisory jurisdiction than this Court exercises.

With all due respect to the sincerity of the District Judges and the Circuit Judges, it is a matter of most serious concern to the States, especially *because* "there is no table of weights and measures for ascertaining what constitutes due process"[66], *because* of the "two court" rule as to findings and the deference which this Court pays to the inferior Federal courts' interpretation of local law and practice, and last, but not least, *because* of the "slim"[67] opportunity for review in this Court, *whether*, in the absence of their consent, either express or implied, they may be compelled,[68] on the mere allegation of a convicted felon who has absolutely nothing to lose from groundless allegations and everything to gain, to appear in inferior Federal

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[64] There are seven members of the Court of Appeals for the Third Circuit. It is possible to have 35 entirely different three judge divisions.

[65] "The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and, therefore, *appellant* in its nature." *Ex Parte Bollman and Swartout* 4 Cr. 75, 101.

See also *Ex Parte Watkins*, 7 Pet. 568.

[66] See opinion of Mr. Justice Frankfurter, dissenting, *Burns v. Wilson*, 346 U. S. 137, 149.

[67] See Opinion of Mr. Justice Frankfurter, dissenting, *Darr v. Burford*, 339 U. S. 200, 235; Griffin v. United States, 336 U. S. 704, 723; Deputy v. DuPont, 308 U. S. 488, 500; Harper & Rosenthal, What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari, 99 U. P. L. R., 293, 297; Harper & Etherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. P. L. R., 354, 359-362.

[68] The State can't ignore the proceeding and rely upon the Court to protect its interests. Such conduct by the State is frequently construed adversely to the State. Cf. *Collins v. Claudy*, 3 Cir., ... F. 2d .... (May 7, 1953).

courts and defend criminal judgments which have withstood both direct and collateral attack in their courts and this Court has declined to review that judicial action.

What of the principle there must be an end to litigation?[69] What of the principle that the State is entitled to due process?[70] What of the principle that orderly Federal procedure "under our dual system of government, demands that * * * a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court"?[71] What of the principle of forbearance which Federal and State courts must, as a matter of necessity, exercise towards each other?[72] What of the inordinate delay in the execution of punishment—in this case already over two years?[73]

The only practical and satisfactory solution to all of these problems lies in the application of the doctrine of *Hans v. Louisiana*[74] *and North Carolina v. Temple*[75] to this proceeding.

Moreover, if the views of Madison ("* * * It is not in the power of individuals to call any State into Court * * * It appears to me that this * * * ["the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under

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[69] See *Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U. S. 206, 213; Cf. *Opinion* of Mr. Justice Clark, *Rosenberg v. United States*, ... U. S. ...., 73 S. Ct. 1152, 1156.

[70] *Stein v. New York*, 346 U. S. 156, 197; *Feeley v. Ragen*, 7 Cir., 166 F. 2d 976, 981.

[71] *Darr v. Burford*, 339 U. S. 200, 217.

[72] *Covell v. Heyman*, 111 U. S. 176, 182;
Darr v. Burford, 339 U. S. 200, 205.

[73] See Opinion of Mr. Justice Reed, dissenting, *Wade v. Mayo*, 334 U. S. 672, 692, and Opinion of Mr. Justice McReynolds, dissenting, *Moore v. Dempsey*, 261 U. S. 86, 93.

[74] 134 U. S. 1.

[75] 134 U. S. 22.

this authority"] can have no operation but this—to give a citizen a right to be heard in the Federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2 Ed. 533), and Marshall ("* * * I hope that no gentlemen will think that a State will be called at the bar of the federal court * * * It is not rational to suppose that the sovereign power should be dragged before a court" IBID, 555) as this court held in Hans v. Louisiana,[76] are still the criteria that result is compelling.

POINT II.

The District Court did not abuse its discretion in refusing to grant a plenary hearing in the face of the record in the trial, appellate and collateral proceedings which were before it.

The District Court was faced with the following incontrovertible facts: (a) experienced trial counsel, a long time resident of the county in which the trial was held and who had been engaged on the recommendation of one of Philadelphia's leading lawyers, made no pretrial application either for a continuance or a change of venue or certiorari from the Supreme Court to remove the case to another county for trial; (b) the trial jurors, on sweeping and searching *voir dire* examinations manifested no personal prejudice against the respondent; (c) while several of the jurors had read newspaper accounts of the crime and the trial of respondent's accomplices, they had formed no opinion of his guilt of innocence and clearly indicated that they would decide the case on the facts and the law; (d)

[76] "It seems to us that the views of these great advocates and defenders of the Constitution were most sensible and just." 134 U. S. 1, 14.

only 7 of 20 possible peremptory challenges were exhausted; (e) the trial judge, a member of the bar for nearly a half century and a trial judge for nearly a quarter of a century, was satisfied that the respondent had received a fair and impartial trial (App'x. 117); (f) no complaint was made in the numerous post verdict proceedings of the issue now being raised until it appeared that all avenues of escape from the penalty were closed; (g) the post verdict statements secured from the trial jurors and attached[17] to the petition for a writ of habeas corpus (App'x. 129-135) alone clearly refuted the contention that empanelling a *fair and impartial jury* was impossible.

Though this case differs in some minor respects from *United States v. Rosenberg*,[18] a capital case, it is submitted, however, that basically they are in conflict. In Rosenberg, the statutory counterpart of habeas corpus was not allowed to serve as a substitute for an appeal. Here, habeas corpus, is being allowed to perform that office. In *Rosenberg*, it was held that voluntary acquiesence in the trial was a conclusive refutation of the contention that it was impossible to impanel an impartial trial jury. The court below reversed the District Court because it did the same thing. Who is right—the Second Circuit in Rosenberg or the Third Circuit in this case? We presume the Second Circuit in Rosenberg.

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[17] These were stricken from the record by the court below. Excerpts therefrom appear on pp. 29-30 of respondent's Petition in this Court at No. 31 October Term, 1951.
See also, App'x. 129-135.

[18] 2 Cir., 200 Fed. 666 cert. den. 345 U. S. 965, reh. den. 345 U. S. 1003.

POINT III.

It is very doubtful that State remedies have been exhausted.

While the issue of hysteria and prejudice preventing the empanelling of a fair and impartial jury was presented to the Supreme Court in the last collateral habeas corpus proceeding, it does not appear, from the opinion of that Court, that it was squarely adjudicated. Possibly it was not because habeas corpus is not a substitute for an appeal.[79] On the other hand, possibly it was impliedly adjudicated.[80] The court below, however, in *Almedia v. Baldi*,[81] refused to accept anything less than a clear statement as evidence of actual adjudication. Here, however, it did.

If the issue was not adjudicated on the last application for habeas corpus to the Supreme Court of Pennsylvania, State remedies have not been exhausted and the District Court, under the recent decision of this Court in *Brown v. Allen*,[82] would have no power to grant affirmative relief.

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[79] *Commonwealth ex rel. Elliott v. Baldi*, 373 Pa. 489, 493, 96 A. 2d 162.
[80] Ibid.
[81] 195 F. 2d 815.
[82] *Brown v. Allen*, 344 U. S. 443, 486.

POINT IV.

The qualifications of a trial juror may not be probed on habeas corpus.

The appropriate time and place to probe the qualification of a trial juror is on the *voir dire* examination—not in a collateral proceeding.[83] If the rule were otherwise, few would be the criminal judgments which would not be challenged in that fashion. Moreover, it is well settled that the mere reading of newspaper accounts does not in and of itself disqualify.[84] Were the rule otherwise, in this day and age, it would be virtually impossible to have a jury trial.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.

August 11, 1953.

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[83] *In Re Schneider*, 148 U. S. 162.
[84] *Reynolds v. United States*, 98 U. S. 145, 155-156;
Holt v. United States, 218 U. S. 245;
United States v. Moran, 2 Cir. 194 F. 2d 623;
Finnegan v. United States, 8 Cir. 204 F. 2d 105.

Office - Supreme Court, U.S.
FILED
AUG 15 1953
HAROLD B. WILLEY, Clerk

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IN THE

Supreme Court of the United States

No. 263 October Term, 1953

JAMES F. MARONEY, Successor to J. W. CLAUDY, Warden, Western State Penitentiary,
PETITIONER,

UNITED STATES OF AMERICA, *ex rel.* DAVID DARCY,
RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

COURTS OF OYER AND TERMINER AND QUARTER SESSIONS

FOR THE COUNTY OF BUCKS

FEBRUARY SESSIONS 1948

No. 37.

COMMONWEALTH,

vs.

HAROLD FOSTER, DAVID DARCY, HARRY ZIETZ, and FELIX CAPONE.

1st Count—Murder.

Excerpts of Testimony.

Doylestown, Pa., June 7, 1948.

Before:

Hon. Hiram H. Keller, P. J., and a Jury.

Present:

Edward G. Biester, Esq., District Attorney, and Willard S. Curtin, Esq., Assistant District Attorney, for the Commonwealth.

Webster S. Achey, Esq., and William M. Power, Esq., for defendant David Darcy.

Mr. Biester: If the Court please, we desire at this time to take up Bill of Indictment No. 37, February Sessions

1948, Commonwealth of Pennsylvania vs. Harold Foster, David Darcy, Harry Zietz, and Felix Capone, first count, murder, and at this time to attach the case of David Darcy and ask that David Darcy be now arraigned for his plea.

The Court: Is the prisoner in court?

Mr. Biester: The prisoner is in court.

2 The Court: The Court will take note that the prisoner David Darcy is in court and may be arraigned, being represented by his counsel.

(Prisoner at the bar of the court pleads "not guilty.")

The Clerk: How will you be tried?

The Defendant: By God and my country.

The Court: We will now proceed with the selection of the jury, and as is the custom the jurors will retire to the grand jury room and will be selected one by one.

Mr. Achey: If the Court please, may I inquire of the clerk how many jurors are available at this panel?

The Clerk: Eighty-one. Thirty-nine excused.

Mr. Achey: I wish to enter an objection to the fact that there are only eighty-one available out of which the selection is to be made in this case.

The Court: Do you have any particular jurors that you are objecting to as being excused?

Mr. Achey: Well, I feel that thirty-nine excuses out of a panel of 120 is prejudicial to the rights of the defendant, sir.

3 The Court: Mr. Achey, these excuses are the result of *non est*, illness, or incapacity.

Mr. Achey: If the excuses are for illness, sir, I haven't any objection.

The Court: We restricted the excuses to that or in cases where they are incapacitated; for instance, a mother who has little children and nobody to look after them.

Mr. Achey: I still make the objection, sir.

The Court: We will note the objection.

Mr. Achey: I ask for an exception.

The Court: Exception granted. The motion is overruled.

(Exception noted for defendant.)

• • •

47 VOIR DIRE EXAMINATION OF TRIAL JURORS.

W. D. PARDOE, sworn.

By Mr. Achey:

Q. Mr. Pardoe, you are listed here as a manufacturer. What is your business?

A. I am in rubber manufacturing.

Q. Where?

A. In Trenton, New Jersey.

Q. What company?

A. Thermoid Company.

Q. How long have you been with that company, sir?

A. Thirty-eight years.

Q. You live in Yardley?

A. Yes.

Q. How long have you been a resident of Bucks County?

A. About eight-and-a-half years.

48 By the Court:

Q. What is your full name, Mr. Pardoe?

A. William Dolton Pardoe.

By Mr. Achey:

Q. Have you read anything in the newspapers relative to the trial of the two boys last week, Foster and Zietz, for the holdup down at the Feasterville Tavern and the death of William Kelly?

A. I read, yes, I read that, sir.

Q. Did you form any opinion as to the guilt or innocence of this defendant, David Darcy?

A. No, I did not.

Q. Did you discuss the matter with anyone?

A. No.

Q. Are you married, sir?

A. Yes.

Q. Do you have any children?

A. Have two.

Q. What are their ages?

A. One is thirty-four and the other is forty.

Q. Have you ever served as a juror in a murder case before?

A. No, I haven't.

Q. Have you served on juries before?

A. Grand jury in New Jersey.

49 Q. Have you any conscientious scruples against capital punishment?

A. No.

Q. Do you believe or feel that if the evidence warrants it and from the charge of the Court as a member of this jury you could bring in a verdict of guilty and recommend the infliction of the death penalty?

A. May I have that question again.

Q. Do you believe that after hearing the evidence in this case and under the charge of this Court could you bring in a verdict of guilty of murder in the first degree and fix the punishment at death?

A. Yes.

Q. Could you also under the same circumstances bring in a verdict of guilty and fix the penalty at life imprisonment?

A. Yes.

Mr. Achey: No challenge.

By Mr. Curtin:

Q. Mr. Pardoe, what is the condition of your health?

A. Very good, sir.

Q. And what is your age?

A. Sixty-four.

Q. Mr. Pardoe, do you know Mr. Achey, one of the defense attorneys?

50 A. No, I do not.

Q. Do you know Mr. Power?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. No, I do not.

Q. Do you know me?

A. No, sir, I do not.

Q. I understood you to say that you have formed no opinion in this case?

A. That is correct.

Q. Do you know William Darcy, the defendant in this case?

A. No.

Q. Do you know William Kelly, the person who died in this matter?

A. No.

Q. Do you know the families of either of these two persons?

A. No, I do not.

Q. I understood, Mr. Pardoe, from your answer that if the facts should warrant it as heard from the witnesses and if the law as given by the Judge should warrant it that you would have no conscientious scruples against the imposition of the death penalty?

A. That is correct, sir.

By the Court:

51 Mr. Pardoe, you were returned here in this panel under the name W. D. Pardoe. It is unusual to have a name on a jury panel by its initials. You say your name is William Dolton Pardoe. Are there any other people in Yardley by the name of W. D. Pardoe?

A. No, sir.

Mr. Curtin: We will accept the juror.

The Court: Take your seat in the box as juror No. 1.

• • •

60 ANNA W. BUCHER, sworn.

By Mr. Curtin:

Q. Are you married or single?

A. Married.

61 Q. Mrs. Bucher, where do you live?

A. Over near Pineville.

Q. What township?

A. Wrightstown Township.

Q. How long have you lived there?

A. About close on to fifteen years.

Q. How long have you been a resident of this county?

A. The same period.

Q. Where did you formerly live, Mrs. Bucher?

A. In Philadelphia.

Q. Mrs. Bucher, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. I guess I don't. I always thought—I did think so at one time, but I guess if it was serious enough I wouldn't have.

Q. Do I understand, then, that if the evidence as you heard it from the witness and the law as given to you by

the Court should warrant it that you would have no conscientious scruples against a verdict which would result in death?

A. That is right.

Q. You would not have such scruples?

A. That is right.

Q. What is the condition of your health, Mrs. Bucher?

A. I guess it is all right.

Q. Your health is good.

A. Yes, sir.

62 Q. You are not currently under a doctor's care?

A. No.

Q. Do you have any children?

A. Yes.

Q. How many?

A. Six.

Q. What are their ages and sexes, please?

A. Five girls and a boy. The oldest is twenty-four years old, twenty-two, the boy is twenty, eighteen, sixteen and twelve.

Q. Do they all live at home?

A. Yes they do. They are away at school, some of them; and one is married, but she is living at home just now.

Q. What is your husband's occupation?

A. He is a physician.

Q. Medical doctor?

A. Yes.

Q. Where does he have his professional office?

A. In Olney in Philadelphia.

Q. Mrs. Bucher, do you know Mr. Achey, one of the defense attorneys?

A. No, I don't.

Q. Do you know Mr. Power, the man associated with him?

A. I don't know anything of them.

Q. Do you know Mr. Biester, the district attorney?

63 A. No.

Q. Do you know me?

A. No. I think maybe I have seen you, but I don't know you.

Q. The case, Mrs. Bucher, about which you are now being examined as a prospective juror involves an occurrence in the lower end of the county on the evening of December 22, 1947, in which four men were involved, one of whom, David Darcy, is now about to be tried and in the course of which a man was allegedly murdered, a man by the name of William Kelly. Now, from that brief statement of the facts do you recall whether you ever read or heard of that case?

A. Well, I read something about it and heard something about it.

Q. Was what you read recently or was it when the offense occurred?

A. I didn't read much at the time. Of course, I guess, when it was brought up for trial I read a little bit more about it.

Q. You did read about it recently, then, as I understand?

A. Yes.

Q. Have you discussed the case?

A. Not particularly.

Q. From what you have read and from any discussion you may have had in the matter have you arrived at any opinion in your own mind as to the guilt or innocence of this particular defendant?

64 A. Not totally, but partially.

Q. You have a partial opinion?

A. Yes.

Q. Is that opinion so fixed in your mind, Mrs. Bucher, that it would influence you in arriving at a verdict if you were seated as a juror?

A. I think not.

Q. Do you feel that you could set aside the opinion that you may have and be influenced and render a verdict solely on the evidence that you heard and the law as you heard it from the Court, or would that opinion influence you?

A. If the verdict were strong enough I guess I would be influenced.

Q. Perhaps I didn't make myself clear. The opinion that you say you have, is that opinion so strong in your own mind that it would influence your verdict regardless of the law and regardless of the evidence that you may hear in this case?

A. No, I don't think so.

By the Court:

Q. Do you feel, notwithstanding the opinion you may have formed, if any, that you could nevertheless render a verdict strictly in accordance with the evidence and the law?

A. I think so, yes.

By Mr. Curtin:

65 Q. Did you know Mr. William Kelly, the person who was killed in this case?

A. No, I didn't.

Q. Do you know David Darcy, the defendant in this case?

A. No.

Q. Did you or do you know either of their families?

A. No, I don't.

Q. Do I understand then, Mrs. Bucher, that you have no conscientious scruples against the death penalty?

A. No.

Q. And if the evidence and the law should warrant it you have no scruples which would prevent you from rendering a verdict which would result in death?

A. That is right.

Mr. Curtin: The commonwealth passes the juror.

By Mr. Achey:

Q. Mrs. Bucher, I understood you to say that you had sort of formed a partial opinion as a result of what you have read about the other two boys tried in this case?

A. That is right.

Q. Now, do you feel that you are able and willing to eliminate that partial opinion that you have formed and render a verdict based upon the evidence that you will hear from the witnesses in this particular case and the instructions of the Court?

66 A. Yes, I believe so.

Q. In other words, do I understand that you are willing to go into this jury box and have an open mind on the subject?

A. Yes.

Q. In other words, you are not set to pre-judge this case without hearing any evidence?

A. That is right.

Q. Have you ever sat on a jury before?

A. Never.

Mr. Biester: If the Court please, we haven't objected to that question, but unless it is shown to be relevant in some way as to whether a prospective juror has previously sat on a jury I can't see what connection it has.

Mr. Achey: Now, Mr. District Attorney, I am entitled to find out what experience she may have had with juries. There is no harm in asking that question.

Mr. Biester: If the Court pleases, I object to it unless Mr. Achey explains why it is of any importance in this case whether a person has or has not sat on a jury.

Mr. Achey: I don't have to explain.

The Court: We will overrule the objection. She has answered "no."

By the Court:

Q. That is correct, isn't it, Mrs. Bucher?

67 A. That is right.

By Mr. Achey:

Q. When you read about this case and read about names of people who were mentioned do you recall whether you knew any of those people?

A. No, I don't know any of them.

Q. Ever have any personal contact with them at all?

A. No.

Q. You recognize that the jury in a murder case, if they find the defendant guilty of murder in the first degree, that it is their sole duty to fix the punishment either at death or life imprisonment?

A. Yes, I know.

Q. And you feel that you have no scruples against capital punishment?

A. I have no scruples, no, but I would like to do it.

Q. But you are willing to render a verdict under the evidence and under the instructions of the Court?

A. That is right.

Mr. Achey: Defense accepts this juror.

MARVIN D. WEIDNER, sworn.

By Mr. Achey:

Q. Where do you live, Mr. Weidner?

68 A. 21 Hamilton Street, Telford, Pa.

Q. What is your business?

A. Clerk, Norfolk and Western Railroad.

Q. Where?

A. Philadelphia.

Q. Philadelphia office?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Any children?

A. One, sir.

Q. How old?

A. Four-and-a-half.

Q. Are you an ex-service man?

A. No, sir.

Q. Have you read anything about the trial of this case?

A. Last week, sir; the verdict of last week's case.

Q. Did you read that in the local paper?

A. Philadelphia paper, sir.

Q. Did you recognize any of the parties whose names were mentioned in connection with that article?

A. No, sir.

Q. Have you discussed the case with anyone?

A. No, sir.

69 Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. Do you understand that in a murder case the law gives the jury the right first to determine whether or not the defendant is guilty of murder in the first degree, and

then the jury has the sole right to determine the punishment, whether death or life imprisonment. Are you aware of that fact?

A. Yes, sir.

Q. If you were selected as a juror in this case would you be willing to render a verdict in accordance with the evidence and instructions of the Court?

A. Yes, sir.

Q. Is there anything in your conscience or your conscientious scruples that would prevent you from rendering a verdict prescribing either death or life imprisonment?

A. No, sir.

Q. Were you ever employed as a private investigator or in any investigating capacity?

A. No, sir.

Q. Were you ever a railroad detective?

A. No, sir.

Q. Did you ever hold any public office such as a justice of the peace?

70 A. Tax collector at the present time.

Q. In Telford?

A. Yes, sir.

Q. Are you acquainted with either Mr. Curtin or Mr. Biester?

A. No, sir.

Q. Of course, you and I don't know each other, do we?

A. I have seen you before, that is all, sir.

Q. And Mr. Power, my assistant?

A. No, sir.

Q. From what you have read about this case have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

Mr. Achey: Passed.

By Mr. Curtin:

Q. Mr. Weidner, did you tell us your age?

A. Thirty-four.

Q. And are you married or single?

A. Married.

Q. Any children?

A. One.

Q. Is that a boy or a girl?

A. Boy.

Q. His age?

A. Four-and-a-half.

Q. What is your condition of health, Mr. Weidner?

71 A. Very good, to the best of my knowledge.

Q. I believe you said that you read about the case, but you formed no opinion as to the guilt or innocence of this defendant?

A. No, sir.

Q. Do you know David Darcy, the defendant in this case?

A. No, sir.

Q. Did you know William Kelly?

A. No, sir.

Q. Do you know the families of either of these two men?

A. No, sir.

Q. Did I understand you to say that you had no conscientious scruples against the death penalty in murder cases?

A. That is right, sir.

Q. So that you would be able, if the facts should warrant it as the evidence was given in court and the law as

given by the Judge as to those facts, to render a verdict involving the death penalty?

A. Yes, sir.

Mr. Curtin: Commonwealth accepts the juror.

• • •

108 JESSE H. HORNE, sworn.

By Mr. Achey:

Q. Mr. Horne, you live outside of Quakertown?

A. That is right.

Q. Whereabouts?

A. About four miles east.

Q. Flatland?

A. Past Flatland, about a mile and a half.

Q. Haycock Township?

A. That is right.

Q. How long have you lived there?

A. Sixteen years.

Q. Farming?

A. That is right.

By the Court:

Q. How old are you, Mr. Horne?

109 A. Forty-one.

By Mr. Achey:

Q. Do you have a wife and family?

A. Wife and two children.

Q. Have you ever been employed as a policeman or detective or investigator?

A. No, sir.

Q. Have you read anything about this case?

A. Not very much.

Q. Do you know any of the parties connected with this case?

A. None whatsoever.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. You are aware that the jury in a murder case has the duty first to find whether the defendant is guilty or not guilty, and if they find the defendant guilty of murder in the first degree then it is their sole duty and power to fix the penalty at either death or life imprisonment; do you know that?

A. Yes, sir.

Q. If you were selected as a juror in this case could you render a verdict and fix the penalty under the instructions of the Court?

A. Yes, sir.

110 Q. Would you feel, sir, that under the evidence if you convicted the defendant of murder in the first degree that you would have to impose the death penalty, or realize that you could also have the alternative of imposing life imprisonment?

Mr. Biester: Will the stenographer please read that question.

(Previous question repeated by the reporter.)

Mr. Biester: We object to that, if the Court pleases. This man doesn't know what the evidence will be.

Mr. Achey: The questions so far have all been put as to give the jury the idea that they must bring in a death penalty. I merely asked him whether or not his conscientious scruples are such that if under the evidence there was a verdict of first degree murder, whether or not he would have anything against imposing life imprisonment as a penalty. I don't

think we have to solely put it to a prospective juror that he must bring in the death penalty.

Mr. Biester: I have no objection to the way Mr. Achey just stated it.

Mr. Achey: I will state it so that it meets the approval of the Court.

The Court: I will sustain the objection.

Mr. Achey: Exception?

The Court: Exception.

(Exception noted for defendant.)

111 By Mr. Achey:

Q. Mr. Horne, if the verdict of the jury in this case were murder in the first degree do you feel that you would have to bring in a verdict fixing the punishment at death or could you fix the punishment at life imprisonment? I am not asking you whether you would do it, but whether you could feel free to give either one of those two punishments?

A. I could do either.

Q. In other words, you do not feel that it is mandatory upon you as a juror in the event of a verdict of first degree murder that you would have to bring in the death penalty?

A. As I understand the question I should say yes.

By the Court:

Q. Could you render a verdict according to the evidence and the law as given to you by the Court?

A. Yes, sir.

By Mr. Achey:

Q. Were you ever a juror heretofore?

A. No.

Q. Do you have any physical disability or illness that would make it difficult or be a handicap for you to serve on this jury?

A. None that I know of.

Q. How many cows do you have at home?

A. Oh, about a dozen.

112 Q. Have you got anybody to take care of them if you should be locked up on this jury?

A. It could be provided for.

Q. We don't want to work a handicap on you, that is the reason I asked that question. Now, did I ask you whether you had read anything about this case or heard anything about it?

A. I did.

Q. You have no opinion as to the guilt or innocence of this defendant?

A. None whatsoever.

Q. If in the trial of this case it was disclosed that the defendant David Darcy and several other were engaged in the commission of a robbery and after the robbery had taken place and the defendant and his companions were leaving the place a murder was committed would you feel that under such evidence it would be mandatory upon you to bring in a verdict of murder in the first degree with the sentence fixed at death?

Mr. Biester: Objected to, if the Court pleases.

The Court: The objection must be sustained. That depends entirely upon the evidence to be received and the law.

Mr. Achey: Exception?

The Court: Exception.

Mr. Achey: Defendant passes.

113 The Court: He couldn't be asked to give an opinion at this time.

By Mr. Curtin:

Q. Mr. Horne, did you say that you were married?

A. Yes, sir.

Q. How many children do you have, sir?

A. Two.

Q. Are they boys or girls?

A. Boy and girl.

Q. What are their ages?

A. Thirteen and nine, respectively.

Q. Is Mrs. Horne living?

A. That is right.

Q. Mr. Horne, do you know Mr. Achey, the defense attorney?

A. No, sir.

Q. Do you know Mr. Power, his associate?

A. No, sir.

Q. Do you know either Mr. Biester or myself?

A. I know Mr. Biester slightly.

Q. Has he ever represented you as your attorney?

A. He has.

Q. He has?

A. Yes, sir.

Q. How long ago, Mr. Horne?

A. I would have to make a guess. I don't know
114 offhand. Probably six or seven years ago.

Q. Would your acquaintanceship with Mr. Biester in any way influence you in arriving at a verdict in this case?

A. None whatsoever.

Q. Do I understand, then, that in the event you were selected as a juror you could reach a verdict entirely uninfluenced by any previous acquaintanceship you might have had with Mr. Biester?

A. I could.

By the Court:

Q. Was this a private business relationship or one

which he performed by virtue of his office as district attorney or assistant district attorney?

A. That was a private affair.

By Mr. Curtin:

Q. How long ago was this that Mr. Biester represented you, Mr. Horne, if you recall?

A. As I said before, I don't know definitely offhand. Six or seven years ago, possibly, maybe eight.

Mr. Biester: If the Court please, we accept the juror with the reservation that Mr. Achey shall have the right to question him further and have him examined on the basis of prior representation, if he wishes to do so.

By Mr. Achey:

115 Q. Mr. Horne, your matter with Mr. Biester was a private matter where you required advice or where it involved real estate, or something like that?

A. My procuring his advice was entirely up to me, if that answers your question. In other words, I was not obligated to see Mr. Biester.

Q. It wasn't a case in court, was it?

A. No, sir.

Q. The fact that you went to Mr. Biester and engaged him to do work for you is not going to have anything to do with your exercising your judgment as a juror in this case; is that correct?

A. That is right.

Q. I mean, you might have had me represent you, or Mr. Curtin?

A. That is right.

Q. And that wouldn't affect your judgment in passing upon the evidence in this case; is that correct?

A. That is correct.

Mr. Achey: All right.

The Court: Accepted as juror number four.

• • •

135 OLIVER C. LANDIS, sworn.

By Mr. Achey:

Q. Mr. Landis, what township do you live in?

A. Plumstead.

136 Q. How long have you been living there?

A. Fifty-eight years.

Q. Do you know anything about this case?

A. Hardly anything. Just that I knew there was such a thing.

Q. You know nothing about the facts or the evidence in the case, then, do you?

A. No, sir.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. If you were sworn as a juror in this case would you be willing to render a verdict according to the evidence and the charge of the Court?

A. I can hardly hear you.

Q. If you were sworn as a juror in this case would you be willing to render a verdict under the evidence and the charge of the Court?

A. Yes, sir.

Q. You say it is difficult for you to hear me from where I am standing?

A. Not if you talk like you are now. I can hear you, but you were sort of mumbling. Now you are talking a little low.

Q. I just wanted to hear what you range was for hearing. Are you afflicted with any physical illness or

137 ailment that might hinder you or handicap you in serving as a juror in this case?

A. No, sir.

Q. Were you under a doctor's care recently?

A. No, sir.

Q. Do you have help at home to take care of your farm should you be drawn as a juror in this case and locked up for a week or ten days?

A. I would say no.

Q. Would it be a handicap to you to serve on this jury?

Mr. Biester: If the Court pleases, it is not a question of whether it would be a handicap. It is a handicap to anybody.

The Court: No doubt about that.

The Witness: Yes, I would say it is a handicap.

By Mr. Achey:

Q. You know that under the law a jury in a murder case has the duty to render a verdict of guilty or not guilty under the evidence and the charge of the Court?

A. Yes.

Q. And in the event of a verdict of guilty of Murder in the first degree it becomes a further duty and the sole duty of the jury to fix the penalty at either death or life imprisonment?

A. Yes.

138 Q. You are aware of that. You feel that in the case of a verdict of guilty of murder in the first degree that you must render a—fix the punishment at death or would you—could you render it for life imprisonment? Do you feel that if the defendant were found guilty of murder in the first degree that the death sentence would be mandatory?

A. It is either one or the other.

Q. Yes.

A. It is mandatory for life imprisonment or death.

Q. Yes.

A. That is right. That is the way I understand it.

Q. Do you feel that if it were murder in the first degree you would have to bring in a verdict of the death penalty?

A. Not the way I understand it.

Q. Have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

Mr. Achey: Passed.

By Mr. Curtin:

Q. Mr. Landis, I don't remember whether you were asked whether you were married or not?

A. I am married.

Q. Do you have any children, sir?

A. Yes, sir.

Q. How many?

139 A. Three.

Q. What are their ages?

A. Thirty, thirty-five, twenty-four.

Q. What are the sexes of the children?

A. Boys.

Q. All boys?

A. Yes.

Q. Mrs. Landis is living?

A. Yes, sir.

Q. And your occupation is farmer?

A. Yes.

Q. Do you have a stock farm?

A. Dairy; chickens and dairy.

Q. I believe you told Mr. Achey that you did not have any opinion in this case; is that correct?

A. That is correct.

Q. Although you had read about it?

A. No, I have not read about it. I know that I have heard—just know that there is such a case, that's all. I hadn't read about it.

Q. I believe you said your health was good?

A. Yes.

Q. Do you know Mr. Achey, the defendant's attorney?

A. I do.

Q. Has he ever represented you?

A. No.

140 Q. You know of him, then, as an attorney, or do you know him socially?

A. As attorney.

Q. But you say he has never represented you?

A. No.

Q. Has he ever represented your family?

A. No.

Q. Do you know Mr. Power?

A. No, I do not.

Q. Do you know either Mr. Biester or myself?

A. Well, I knew you fellows from seeing your faces and seeing you here, that's all.

Q. Have either of us represented you?

A. No.

Q. Did you know William Kelly, the deceased?

A. No.

Q. Do you know David Darcy, the defendant?

A. No.

Q. Do you know either of their families?

A. No.

Q. I believe you said, sir, that if the facts as you heard them here in the courtroom from the witnesses and the law as given to you by the Judge should warrant it you would have no conscientious scruples which would prevent you from rendering a verdict resulting in death?

141 A. That is correct.

Q. You have no scruples against the death penalty in murder cases?

A. No.

Mr. Curtin: Commonwealth accepts the juror.

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157 FRANKLIN T. FRETZ, sworn.

By Mr. Achey:

Q. Your business is that of a miller, I believe?

A. Salesman, sir.

Q. You don't actually work in the mill?

A. No, sir.

Q. Whom do you work for?

A. Flour Milling Company in Bangor.

Q. Does your territory cover all of Bucks County?

A. Yes, sir; eastern Pennsylvania.

Q. Are you acquainted with Feasterville, where this murder took place?

A. Feasterville?

Q. Yes. Did you ever hear of that?

A. I have heard of it. I don't know too much about it.

Q. Have you read anything about this case?

A. Well, I read, and that's about all.

Q. From what you have read have you formed any opinion as to the guilt or innocence of this defendant?

A. No. No, I haven't.

Q. Have you discussed the case with other people?

A. No. No, sir.

Q. Do you know any of the parties who were involved, either policemen or witnesses?

A. No, sir.

158 Q. Do you have any conscientious scruples against capital punishment?

A. Well, if they are proved guilty.

Q. In other words, if a person is found guilty of first degree murder, it is the jury's duty to fix the degree of punishment at either death or life imprisonment. You are aware of that, are you not?

A. Yes, sir.

Q. And you realize that even though the defendant is found guilty of murder in the first degree it is not mandatory upon the jury to impose the death penalty, do you know that?

A. Yes, sir.

Q. They can also make a recommendation for life imprisonment; is that true?

A. That is right.

Q. You don't have any conscientious scruples, in the event the defendant is found guilty of murder in the first degree, in bringing in either verdict; is that right?

A. That is right.

Q. Do you know either of these gentlemen, Mr. Biester or Mr. Curtin?

A. I don't believe I do.

Q. Have you ever had any business transactions with either one of them?

A. No.

159 Q. Have you ever had any business transactions with me?

A. Not that I know of.

Q. Or Mr. Power?

A. No.

Q. I don't suppose you knew Mr. Kelly, the man who was killed in this matter?

A. Did I know him?

Q. Yes.

A. No, sir.

Q. William Kelly?

A. No, sir.

Mr. Achey: Passed, your Honor.

By Mr. Curtin:

Q. Do I understand, sir, that you do not know Mr. Achey?

A. Is that Mr. Achey there?

Q. That was Mr. Achey who was just talking.

A. Well, I have heard of him, but I wouldn't know him.

Q. I understand, then, that he has never represented you as attorney?

A. No, sir.

Q. And you don't know him socially, then?

A. No.

Q. And you say you don't know Mr. Power or either Mr. Biester, the district attorney, or myself?

A. No, sir.

160 Q. He is the gentleman who just walked away from me. What is your age, Mr. Fretz?

A. Thirty-seven.

Q. And are you married or single?

A. Married.

Q. Any children?

A. One.

Q. Boy or girl?

A. Girl.

Q. Her age, please?

A. She is fifteen. She is going to be sixteen. She is fifteen today.

Q. And she lives at home, I presume, with you and Mrs. Fretz?

A. That is right.

Q. Mr. Fretz, this case involves an occurrence in Feasterville on the 22nd day of December, 1947, in which

four men were involved, one of whom, David Darcy, one of the defendants, is here today. Did you ever hear of the case?

A. I heard of it.

Q. And read about it or discussed it?

A. Well, I have read about it. I just didn't take any interest in it.

Q. I understand you to say you formed no opinion from what you read?

A. No.

161 Q. From what you read or heard; is that correct?

A. That is right.

Q. And I believe you said you did not know William Kelly?

A. No.

Q. Do you know the defendant, David Darcy?

A. No.

Q. Do you know either of their families?

A. No.

Q. What is your condition of health, Mr. Fretz?

A. Well, I don't know.

Q. Are you currently suffering from any physical disability?

A. No.

Q. You are not currently under a doctor's care?

A. No, indeed not.

Q. And did I understand you to say that you had no scruples against capital punishment?

By the Court:

Q. Do you know what the word "scruples" means?

A. Will you explain it to me, sir?

Q. Do you have any objection to the imposition of the

death penalty for murder in the first degree, if the evidence warrants it?

A. No.

By Mr. Curtin:

Q. Do I understand then, sir, that in the event
162 that the facts as you hear them from the witnesses and the law as you heard it from the Court should warrant it you would have no conscientious scruples against a verdict resulting in death?

A. That is right.

Q. You would have no such scruples?

A. No, sir.

Mr. Curtin: Commonwealth accepts the juror.

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165 ROGER MASON, sworn.

By Mr. Curtin:

Q. Where do you live, Mr. Mason?

A. Near Dublin.

Q. In what township?

A. Bedminster.

Q. How long have you lived there?

A. Two years permanently. I have had the place ten years.

Q. Where have you lived previously to that?

A. New Jersey. Westfield.

Q. How long have you lived in Bucks County?

A. About two years.

Q. Are you married or single?

A. Married.

Q. What is your age?

A. Sixty-five.

Q. Mr. Mason, do you have any conscientious scruples

against the imposition of the death penalty in murder cases?

A. No.

Q. You have not?

A. No.

Q. Do I understand then, sir, that you would have no conscientious scruples against rendering a verdict
166 which would result in the death of this defendant if the facts as you learned them from the witnesses here in the courtroom and the law as told to you by the Court should warrant it?

A. Under those circumstances I have no scruples.

Q. No conscientious scruples?

A. No.

Q. Do you have any children, Mr. Mason?

A. Yes, three.

Q. Boys or girls?

A. Boys.

Q. What are their ages?

A. Thirty-one, twenty-six, and twenty-four.

Q. The boys all live at home with you?

A. No. None.

Q. What is the condition of your health, Mr. Mason?

A. Good.

Q. I take it, then, you are not currently under the care of a physician?

A. No.

Q. And suffering from no physicial disability at this time?

A. No.

Q. Mr. Mason, this case involves an occurrence at Feasterville, in the lower end of the county, on the 22nd day of December 1947, in which four men were involved,

one of whom, David Darcy, is now on trial, and in
167 the course of which a man by the name of William Kelly was allegedly murdered. Did you ever hear of that case?

A. I believe I saw the headlines in the paper.

Q. You read something about it in the paper?

A. Yes.

Q. Have you discussed the case?

A. No.

Q. From what you read in the paper have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?

A. No. I paid very little attention to it.

Q. You formed no opinion. Mr. Mason, do you know Mr. Achey, the defense attorney?

A. No.

Q. Do you know Mr. Power, his associate?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. I think I do.

Q. Has he represented you as attorney?

A. No. The other way around.

Q. Mr. Biester was in some case in which you were a party?

A. Well, it didn't get to a case; it was settled out of court.

Q. Would your acquaintanceship with Mr. Biester influence you in any way in your arriving at a verdict in this case?

A. No, I don't think so.

168 Q. Could you, if chosen as a juror, arrive at a verdict or render a verdict solely from the evidence that you have heard from the witness stand and from the law as the Judge gave it to you?

A. I should do my best.

Q. Entirely uninfluenced by your acquaintanceship with Mr. Biester?

A. Yes.

Q. Do you know me?

A. No.

Q. Do you know the defendant, David Darcy?

A. No.

Q. Did you know the deceased, William Kelly?

A. No.

Q. Do you know either of their families?

A. No.

Mr. Curtin: Commonwealth passes.

By Mr. Achey:

Q. Mr. Mason, what did you do before this and while you lived in Westfield, New Jersey?

A. Why, my last work was with the Crucible Steel Company. I was a coordinating engineer for them.

Q. Where is Westfield, New Jersey?

A. About twenty miles west of New York.

Q. How long had you lived there?

169 A. About twenty years.

Q. Did you ever serve on a murder jury before?

A. No.

Q. Westfield is where the Halls Mills case took place some years ago?

Mr. Biester: If the Court pleases, I object. I don't think that makes any difference.

The Court: It is not material.

By Mr. Achey:

Q. You say you have only read the headlines about this case. Where did you read them? In what paper?

A. That was in the Doylestown paper.

Q. Well, there were a number of headlines, weren't

there, on a number of successive days? Did you read the articles, too?

A. No, I didn't read the articles, only the headlines.

Q. You own your property where you live?

A. Yes.

Q. You say you came here about two years ago?

A. To live permanently. I have had my farm—I have had it for over ten years, or about ten years.

Q. Well, you have owned property in Bucks County for ten years, and you have taken up your permanent residence about two years ago?

A. That is right.

Q. Were you at any time in your life employed as a guard or policeman or private investigator, or have you done any investigating work whatsoever?

A. Was I employed?

Q. Yes.

A. No, never.

Q. At no time?

A. Never.

Q. Did you ever hold public office?

A. No.

Q. Never been a justice of the peace?

A. No.

Q. Do you actually farm this farm or just live on it?

A. I am farming it.

Q. If you were drawn on this jury would you have someone to take care of your stock, or would you worry about that?

A. Well, I have some livestock, yes.

Q. Do you have anyone to take care of it?

A. No.

Q. You say that you have no conscientious scruples against the imposition of the death penalty following the conviction of murder in the first degree?

A. Under the circumstances as were outlined, no.

Q. You feel that you could render a verdict under the evidence and under the charge of the Court without any pangs of conscience whatsoever in your verdict of the death penalty?

171 A. Yes, with the evidence and the Court's instructions I believe I could.

Q. You said in your answer, "under the circumstances as outlined." What did you mean by that?

A. The way that the question was put to me, with the evidence being satisfactory to my mind, and the court's instructions given to cover the situation.

Q. You would follow the instructions of the Court with respect to the law?

A. Right.

Q. You recognize that in this state the jury has the power, after a conviction of murder and a verdict of guilty of murder in the first degree, to impose the penalty of either death or of life imprisonment. You are aware of that, are you not?

A. I didn't know it.

Q. You did not know that. Well, in this state, where a verdict is brought in of murder in the first degree, the sole province of the jury is to fix the punishment, namely, either the death penalty or life imprisonment. It is not the province of the Court to fix the penalty. You did not know that?

A. No, I didn't know that.

Q. Well, now that you know that does that make any difference to you as to whether or not you have any conscientious scruples to the imposition of the death penalty?

A. I don't see that that alters it any, no.

172 Q. You feel that in the event of a verdict of guilty of murder in the first degree it is mandatory upon you to recommend the death penalty?

A. You just explained it was not.

Q. I am asking you whether you feel it is mandatory?

A. Well, after your explaining it is not, why, I would say no.

Q. In other words, Mr. Mason, you are now aware of the fact that the jury has the power, after a verdict of murder in the first degree, to fix the penalty at either life imprisonment or death? It is now clear in your mind, is it?

A. Yes, sir; if that is the law, why, I guess it is clear in my mind.

Q. In the event of a conviction of murder in the first degree is there anything in your conscientious scruples that would prevent you from bringing in a verdict of life imprisonment?

A. No.

Q. I believe you said that you were an engineer?

A. Right.

Q. Chemical or mechanical?

A. Well, electrical by education.

Q. You work for the Crucible Steel Corporation?

A. Crucible Steel Company for the last few years.

Q. I want to ask you one other question, Mr. Mason. Is your farm operations such that it would cause you to worry about your absence of being away from it a week, if you were on this jury?

173 A. No question I would rather not be away from it.

Q. I understand that, but I want to know whether or not the worry it would cause you by being away from it might influence you or affect you in your judgment as a member of this panel?

A. I will try not to let it affect my judgment?

Mr. Achey: Defendant accepts the juror.

* * *

178 HOWARD PRICE, sworn.

By Mr. Achey:

Q. Where do you live, Mr. Price?

A. Two miles east of Mechanicsville.

Q. On what road?

A. Street Road.

Q. How long have you lived there?

A. Forty-nine years.

Q. You have a farm out there?

A. Have two of them.

Q. Do you know anything about this case?

179 A. Oh, only what I read in the paper.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. Well, you can't form much opinion when you read newspapers, I imagine. That is the only answer I can give you.

Q. I mean, from what you have read have you formed any opinion as to this man's guilt or innocence?

A. I would say no.

Q. In other words, you don't believe everything you read in the newspapers?

A. No, sir.

Q. Do you know Mr. Biester, the district attorney?

A. Oh, I just know him as—

Q. I mean outside?

A. No. I just know him. I seen him out different times. I don't think he knows me.

Q. You are not an acquaintance of his?

A. No.

Q. Nor of Mr. Curtin, the assistant district attorney?

A. No.

Q. You are not an acquaintance of mine?

A. Guess not, no.

Q. Nor Mr. Power, my associate?

A. No.

Q. Do you have any conscientious objections,
180 scruples, against capital punishments? In other words, if a man is convicted of murder in the first degree do you have any objection to finding him guilty and imposing the death penalty?

A. I would say not.

Q. Are you aware of the fact that here in Pennsylvania under the law the jury has the right, duty rather, to pass upon the guilt or innocence of the defendant, and if they convict the defendant of first degree murder then it is the sole duty of the jury to fix the punishment at either death or life imprisonment. Are you aware of that?

A. Oh, yes.

Q. Is it your understanding that where, after a verdict of guilty of first degree murder is returned, that the jury must bring in a verdict of the death penalty?

Mr. Biester: If the Court please, Mr. Achey has asked that several times. We object, because it would be inconsistent with the question and answer just given.

The Court: Yes.

Mr. Biester: In which the man was told correctly that the jury could impose either penalty. The prospective juror said he understands that, and now he is asking it in an entirely different way.

The Court: I wonder if Mr. Achey would recognize the question if you read it back to him?

(Previous question repeated by the reporter.)

181 Mr. Achey: My thought is this, your Honor, that in a verdict of guilty of first degree murder that he knows that there are two punishments, one is either the death penalty or life imprisonment. Now my

question is directed to this point, whether or not he feels that he must bring in the death penalty or whether or not they can bring in life imprisonment. Now I think that is a perfectly fair question, because the juror may be under the impression that where there is a verdict of guilty of first degree murder it is mandatory to bring in a death sentence.

The Court: Doesn't that pre-suppose instructions on the subject first?

Mr. Achey: Well, of course, that may be a little late if the juror—we are now inquiring of the prospective juror what his beliefs are to determine whether or not we shall challenge his qualifications either for cause or pre-emptorily. If he believes it is mandatory—

The Court: But you have already told him that that is not a fact; that he could either return a verdict resulting in the death penalty or life imprisonment, if they find the defendant guilty of murder in the first degree.

Mr. Achey: Maybe I am putting the cart before the horse. Maybe I should have asked that question before I asked the other one. All right, I won't pursue it, in view of the objection.

182 By Mr. Achey:

Q. Mr. Price, what is your condition of health?

A. Oh, I guess fair.

Q. You haven't been under the doctor's care lately, have you?

A. No.

Q. And you feel that you could serve on this jury although you might be kept together here for possibly a week or ten days? That would not seriously impair your health?

A. Oh, I don't know whether that would or not. That is a question.

Q. But at the present time you feel fine?

A. Yes, I feel all right.

Mr. Achey: Defense passes.

By Mr. Curtin:

Q. Do I understand, Mr. Price, that you are not currently under any physician's care?

A. No, I am not.

Q. And I believe you also said that you have no conscientious scruples against the imposition of the death penalty in murder cases if the facts and the law warrant it?

A. That is right.

Q. Did you tell us whether or not you were married?

A. Oh, yes, married.

Q. Do you have any children?

183 A. No children.

Q. How long have you been a farmer, Mr. Price?

A. All the days of my life.

Q. I believe you said you only knew Mr. Achey from seeing him on the street?

A. That is right.

Q. You have never been an acquaintance of his?

A. No.

Q. I think you said the same as to Mr. Power, Mr. Biester, and myself?

A. That is correct.

Mr. Curtin: Commonwealth accepts the juror.

* * *

189 (Tuesday, June 8, 1948, 9:30 o'clock a.m.)

Mr. Biester: If the Court pleases, let the stenographer please note that the defendant, David Darcy, together with his counsel, are now in court and ready to proceed with the calling of the jury on *voir dire*.

The Court: You may proceed with the calling of the jury.

Mr. Biester: If the Court please, I should like to make a motion at sidebar.

(The following took place at sidebar, not in the hearing of the jury.)

Mr. Biester: Yesterday during the calling of the jury on the *voir dire* one of the prospective jurors made a statement which Mr. Achey felt was inimical to his case, and he asked that a mistrial be declared. We have now asked that the eight jurors who have been called in the box be excused so nothing of that kind can happen again; and since Mr. Achey has objected to that off the record I think that should be put on the record so that if anything arises in the calling of the jury it would not be the basis of a mistrial.

Mr. Achey: I object, because I don't think there is any precedent for locking up a jury or keeping them out of the court room after they have been asked or accepted to sit in this trial. They have a
190 right to sit in court, and it is their duty to be in court.

The Court: They haven't been sworn.

Mr. Achey: That doesn't make any difference. They have been selected.

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220 L. CALVIN FLUCK, sworn.

By Mr. Achey:

Q. Mr. Fluck, you live in Quakertown?

A. I do.

221 Q. What is your business?

A. Full fashioned hosiery knitter.

Q. By whom are you employed?

A. Best Made Silk Hosiery.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. No.

Q. And have you read about this case?

A. I have not.

Q. Have you discussed it with anyone?

A. I have not.

Q. Do you know anything whatsoever about the facts in the case?

A. I do not.

Q. Do you have any conscientious scruples against capital punishment?

A. I have not.

Q. If you were sworn as a juror in this case would you render a verdict according to the evidence and the instructions of the court?

A. I would.

Q. Are you at present a justice of the peace or do you hold any public office?

A. I do not.

222 Q. You have not been connected with any law enforcement agency?

A. I have not.

Q. Are you acquainted with Mr. Biester, the district attorney?

A. I am not.

Q. Or Mr. Curtin or myself?

A. I am not.

Q. Or Mr. Power?

A. I am not.

Q. Do you have any physical ailment which might handi-

cap you or might inconvenience you in sitting as a juror in the trial of this case?

A. Not that I know of.

Mr. Achey: No challenge.

By Mr. Curtin:

Q. Mr. Fluck, the occurrence involved here happened on the 22nd day of December 1947 in Feasterville in the lower part of Bucks County involving four men, of which David Darcy is one, and in the course of which one William Kelly was allegedly murdered. From that recitation of the facts, are you familiar with this case?

A. I am not.

Q. So therefore you have arrived at no opinion of this case?

A. I did not.

By the Court:

Q. You said you did not read about this case?

223 A. That is true, I have not.

Q. Or discussed it with anybody?

A. No, sir.

By Mr. Curtin:

Q. Did you know William Kelly, the deceased?

A. I did not.

Q. Do you know David Darcy, this defendant?

A. I do not.

Q. Do you know the families of either of these two men?

A. I do not.

Q. Do you have any children, sir?

A. I have not.

Q. Are you married or single?

A. Married.

Q. Is Mrs. Fluck living?

A. She is.

Q. And I believe you said your condition of health was good?

A. So far as I know.

Q. And I believe you also said that you knew none of the attorneys, Mr. Biester, Mr. Power?

A. That is true.

Q. Mr. Achey or myself?

A. That is true.

The Court: Has he been asked about his scruples?

Mr. Curtin: Yes, sir.

224 By Mr. Curtin:

Q. I believe you said you had no conscientious scruples against the imposition of the death penalty?

A. No.

By the Court:

Q. You are not opposed to the death penalty if the evidence and the law warrant it?

A. I am not.

By Mr. Curtin:

Q. Then as I understand it, sir, if the facts as you heard them from the witnesses and the law as explained to you by the Court should warrant it you would have no scruples which would prevent you from rendering a verdict of death?

A. That is true.

Q. You have no such scruples?

A. No.

Mr. Curtin: The commonwealth accepts the juror.

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228 ELVA A. SHIVE, sworn.

By Mr. Curtin:

Q. Are you married or single?

A. I am married.

Q. Mrs. Shive, where do you live?

A. Dublin.

Q. How long have you lived there?

A. Eight years.

Q. Where did you live prior to living in Dublin?

A. New Britain Township.

Q. How long have you lived in Bucks County?

A. All my life.

Q. What is your age?

A. Sixty.

229 Q. Do you have any children?

A. By my first husband.

Q. How many children?

A. One.

Q. Boy or girl?

A. Boy.

Q. And his age, please?

A. Thirty-six.

Q. Mrs. Shive, do you have any conscientious scruples against the rendering of a verdict of death in a murder case?

A. No.

Q. You have no such scruples. Do I understand, then, that if the facts as you heard them and the law as the Judge should expound it to you would warrant it you would have no scruples against rendering a verdict of death?

By the Court:

Q. Do you know what is meant by the word "scruples"?

A. Whether I object.

By Mr. Curtin:

Q. Do I understand, then, that if the facts as you should hear them from the witnesses should warrant it, and if the law, as explained by the Court, should warrant it, you would have no conscientious scruples against the death penalty?

A. What evidence I believe.

Q. You would have no scruples?

230 By the Court:

Q. You say you do believe in the death penalty if the evidence warrants it?

A. Yes, with good evidence.

By Mr. Curtin:

Q. What is the condition of your health, Mrs. Shive?

A. All right, I guess, as far as I know.

Q. You are not currently under any doctor's care?

A. No.

Q. What is your husband's occupation?

A. Painter.

Q. Self employed?

A. Yes.

Q. Do you have any occupation other than housewife?

A. No.

Q. Do you know Mr. Achey, the defense attorney?

A. I think I do.

Q. Have you ever been a client of his?

A. No.

Q. Do you know him socially?

A. No. Just I know him.

Q. Do you know him from just seeing him about or because of personal contact?

A. Just from seeing him.

Q. Do you know Mr. Power, his associate, William

231 Power, the young man seated at the table with him?

A. No.

Q. Do you know Mr. Biester, the district attorney, the gentleman seated to my right? I presume you do not. Do you know me, Mrs. Shive?

A. No.

Q. Would your acquaintanceship or knowing Mr. Achey influence you in any way in arriving at a verdict in this case? Do you understand my question?

A. Yes; whether he could influence me, you mean.

Q. Would the fact that you know Mr. Achey, as you say from seeing him about, would that influence you in any way in arriving at a verdict in this case, or would you be guided solely by the evidence that you heard here and the law as explained by the Court?

A. By the evidence that I hear.

Q. You would not be influenced at all by the fact that you know Mr. Achey?

A. I don't think so. If I am speaking right—

The Court: I don't believe the witness understands the questions.

The Witness: I just know him.

By Mr. Curtin:

Q. The fact that you know Mr. Achey would have no effect on you?

By the Court:

232 Q. Would that prevent you from rendering a verdict according to the evidence, the mere fact that you know Mr. Achey?

A. No, I don't think it would.

Q. It wouldn't interfere with it at all?

A. I don't think so.

By Mr. Curtin:

Q. Mrs. Shive, this case involves an occurrence in Feasterville on the date of December 22, 1947, wherein four

men were involved, one of whom was David Darcy, the man now on trial, and in the court of which a man by the name of William Kelly was allegedly murdered. Now, from that brief recitation of the facts have you ever heard of the case?

A. No; I don't know too much about it.

Q. You have heard of it, however?

A. I know.

Q. Did you read about it?

A. Some.

Q. Have you discussed it?

A. No.

Q. As a result of what you read about it have you formed any opinion?

A. No.

Q. As to the guilt or innocence of this defendant?

A. I don't know.

Q. You have not?

233 Mr. Curtin: Commonwealth passes the juror.

By Mr. Achey:

Q. How long did you say you lived in Dublin?

A. Eight years.

Q. Where did you live before that?

A. New Britain Township.

Q. You have stated that you have no objections to bringing in a verdict fixing the penalty in a murder case of death, have you not?

A. Yes.

Q. Would you have any objection or any conscientious scruples against bringing in a verdict and fixing the punishment at life imprisonment?

Mr. Biester: If the Court please, we object to that question, it being a double barreled question. If he will ask the question on conscientious objection,

of course I have no objection to that. If he said would she have any objection to bringing in such a verdict, she can't possibly answer that question. She doesn't know.

Mr. Achey: I will withdraw the question in view of the objection.

By Mr. Achey:

Q. In the event of a conviction of murder in the first degree do you have any conscientious scruples against bringing in a verdict of life imprisonment?

234 A. No, I don't.

Mr. Achey: Defendant accepts the juror.

(Recess taken from 10:55 a. m. to 11:20 a. m.)

Mr. Beister: May it be noted, if the Court pleases, that the defendant and his counsel are in court?

The Court: So noted.

• • •

238 RUTH G. BLISS, sworn.

By Mr. Curtin:

Q. Your name is Ruth G. Bliss?

A. My name is Ruth G. Bliss.

Q. Are you married or single?

A. Married.

Q. Mrs. Bliss, where do you live?

239 A. 485 N. Main, Doylestown.

Q. How long have you lived in Doylestown?

A. About seventeen years.

Q. What is your age?

A. Sixty.

Q. Mrs. Bliss, have you any conscientious scruples against the death penalty in murder cases?

A. No, not particularly.

Q. In the event that the facts as you heard them from the witnesses and the law as given to you by the Court should warrant it would you have any scruples that would prevent you from rendering a verdict of death in this case?

A. No.

Q. Do you have any children, Mrs. Bliss?

A. None.

Q. You said "none"?

A. Not any.

Q. What is your husband's occupation?

A. He is retired right now.

Q. Do you have any occupation other than housewife?

A. Yes. I have an antique shop. My own business.

Q. How long have you had that business?

A. About sixteen years.

Q. Where is that located?

A. In my home.

240 Q. Where?

A. Doylestown.

Q. Mrs. Bliss, do you know Mr. Achey, the defense attorney?

A. Casually.

Q. He has never represented you as attorney?

A. No.

Q. Do you know Mr. Power, his associate?

A. I don't know him at all.

Q. Do you know Mr. Biester, the district attorney?

A. Casually, too.

Q. He has never represented you?

A. No.

Q. How about myself?

A. I know you just casually, too, but you never represented me.

Q. Mrs. Bliss, this case involves an occurrence in Feasterville in the lower end of Bucks County on the evening of December 22, 1947, involving four young men, one of whom, David Darcy, is now on trial, and in the course of which a man by the name of William Kelly was allegedly murdered. From that recitation of the facts have you heard of the case?

A. Why, I haven't read it in detail. I have read the headlines, but not in detail.

Q. And have you formed any opinion as to the guilt or innocence of this defendant?

A. No, no, I haven't because I haven't read it in
241 detail enough to know.

Q. Mrs. Bliss, did you know the deceased, William Kelly?

A. No.

Q. Do you know the defendant David Darcy?

A. No.

Q. Do you know either of their families?

A. Not any.

Q. What is the condition of your health, Mrs. Bliss?

A. Perfect, I think.

Q. You are not currently under the care of a physician?

A. Not at any time.

Mr. Curtin: Commonwealth passes the juror.

By Mr. Achey:

Q. Mrs. Bliss, have you ever sat on a jury before?

A. No, I haven't.

Q. You are aware that in this state the jury has the duty after finding a verdict of guilty of murder in the first degree to fix the penalty at either death or life imprisonment?

A. Yes.

Q. You say you have no scruples against capital punishment?

A. No, not whatever.

Q. And you have not formed any opinion as to the guilt or innocence of the defendant in this case by what you have read or conversed about the facts?

A. No, I really haven't. I haven't read enough
242 about it, as I said before; just the headlines.

Q. Would the outcome of the prior trial last week have any influence on your judgment in this case?

A. No. No.

Mr. Achey: Defendant accepts the juror.

* * *

254 ANN L. REED, sworn.

By Mr. Curtin:

Q. Are you married or single?

A. Married.

Q. Mrs. Reed, where do you live?

255 A. Penns Park.

Q. How long have you lived there?

A. Ten years.

Q. What is your husband's occupation?

A. Insurance.

Q. Do you have any children?

A. Two.

Q. What are their ages?

A. One ten and one five.

Q. Who else lives in the household in addition to your husband and you and the children, if anyone?

A. My mother-in-law.

Q. Would she be in a position to take care of the two children in the event you proceeded as a juror in this case, if I told you it would take several days?

A. Yes, I believe so.

Q. Mrs. Reed, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. No, not particularly.

Q. Do I understand, then, that if the facts as you heard them from the witnesses should warrant it and if the law as explained to you by the Court should warrant it you would have no scruples against rendering a verdict which would result in death for this defendant?

A. No.

256 Q. You have no such scruples?

A. No.

Q. What is the condition of your health, Mrs. Reed?

A. Oh, it has been very good, as far as I know.

Q. You are not currently under the care of any physician?

A. No.

Q. Mrs. Reed, this case involves a matter, an occurrence, in Feasterville on the evening of December 22, 1947, in which four men were involved, one of whom, David Darcy, is on trial, and in the course of which occurrence a man by the name of William Kelly was allegedly murdered. Do you know anything about that case?

A. I have been reading about it, yes.

Q. You read about it in the papers?

A. Yes, sir.

Q. Have you also discussed the case?

A. Oh, with my family, I suppose.

Q. As a result of what you have read and your discussions have you formed any opinion as to the guilt or innocence of this particular defendant, David Darcy?

A. No.

Q. You have not?

A. No.

Q. Do you know Mr. Achey, the defense attorney?

A. No.

257 Q. Do you know Mr. Power, his associate?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. No.

Q. Do you know me?

A. No.

Q. Do you know David Darcy, the defendant?

A. No.

Q. Did you know the deceased, William Kelly?

A. No.

Q. Do you know either of their families?

A. No.

Q. How long did you say you have been a resident of Bucks County?

A. Oh, about twenty years, I guess.

Q. Do you have any occupation other than housewife?

A. No.

Q. Mrs. Reed, when I asked you as to whether you had any conscientious scruples against the death penalty you said "not particularly," as I understand it. What do you mean by that?

A. Oh, I don't know.

Q. Do you know what conscientious scruples are?

A. Yes. They are against putting anyone to death, isn't it?

Q. Conscientious scruples are something that

258 flows from your innermost being which makes you think something is either morally right or morally wrong. Do you have any such scruples in a case of this kind?

A. Well, I think that they—

Q. Yes or no rather than explain it.

A. No.

Q. You have no such scruples?

A. No.

Q. You would have no conscientious scruples which would prevent you from rendering such a verdict if the law and the facts should warrant it; is that correct?

A. Yes.

Q. What did you say your age was?

A. Twenty-eight.

Mr. Curtin: Commonwealth accepts.

The Court: Commonwealth passes?

Mr. Curtin: Yes.

By Mr. Achey:

Q. Mrs. Reed, you say your husband is in the insurance business?

A. Yes.

Q. Life insurance or all types?

A. Yes, all kinds.

Q. Where is his place of business?

A. Penns Park.

259 Q. You have lived in Penns Park, you say, for ten years?

A. Yes.

Q. Were you born in Bucks County?

A. No. I was born in Philadelphia County.

Q. How long did you say you were married?

A. Eleven years.

Q. Is your husband a veteran?

A. No.

Q. Were you a Waac or a Wave in the last War?

A. No.

Q. May I ask you, madam, in what papers you read about this previous trial?

A. Well, the Philadelphia Inquirer and the Doylestown Intelligencer.

Q. You have formed no opinion as to the guilt or innocence of David Darcy?

A. No, I haven't.

Q. And from the outcome of the other trial you have formed no opinion?

A. No.

Q. You are willing to try this case and render a verdict under the evidence as presented in this particular case and under the instructions of the Court?

A. Yes.

Mr. Achey: Defendant accepts the juror.

260 Mr. Biester: If the Court please, we think this is the proper time to select two alternate jurors in this case in the event that sickness or incapacity should overcome one of the twelve jurors in the box; I therefore ask that the jury be completed in the calling of two alternate jurors.

The Court: We will grant your request, and after the noon intermission we will proceed with the calling of two alternate jurors.

This jury will now be excused for the noon luncheon recess in the custody of the tipstaff, and we again remind you not to discuss this case during your intermission.

(The following discussion took place at sidebar, not in the hearing of the jury.)

The Court: You say you want to make a motion before we issue a new venire?

Mr. Achey: I can't make it until I know whether this panel is going to be exhausted. The purpose of my motion would not arise until the panel were exhausted.

Mr. Beister: I don't think we can wait until the last juror is called.

Mr. Achey: Then the purpose of my motion, Sir, is in view of the fact that the venire has been ex-

hausted and this case being the second trial under a single bill of indictment where four defendants are indicted, I would move for a change of venue by reason of the fact that the jury panel has
261 been exhausted and the number of excuses that were given to jurors who were originally summoned in the number of 120 was prejudicial to the defendant and he was unable to draw the jurors out of the panel as originally summoned.

The Court: You are not making the motion at this time?

Mr. Achey: I will make it if your Honor feels that it is proper at this time. It may be that we can draw these two other jurors.

The Court: We will wait until the panel is exhausted.

• • •

263 WILLIAM F. HICKEY, sworn.

By Mr. Curtin:

Q. Mr. Hickey, you live in Morrisville?

A. I do.

264 Q. How long have you lived there, sir?

A. Eight years.

Q. And where did you live prior to that?

A. New Jersey.

Q. Are you married, sir?

A. I am.

Q. Do you have any children?

A. I do.

Q. Boys or girls?

A. One girl.

Q. And her age, please?

A. Twenty.

Q. What is your age?

A. Forty-five.

Q. Mr. Hickey, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. No.

Q. Do I understand, then, that in the event that the evidence as given by the witnesses and the law as laid down by the Court should warrant it you would have no conscientious scruples which would prevent you from rendering a verdict resulting in death?

A. No.

Q. What is your occupation, sir?

A. I am a construction supervisor for the telephone company.

265 Q. Bell Telephone Company of New Jersey?

A. That is right.

Q. Mr. Hickey, do you know Mr. Achey, the defense attorney?

A. No, I do not.

Q. Do you know Mr. Power, his associate?

A. I do not.

Q. Do you know Mr. Biester, the district attorney?

A. No, sir.

Q. Do you know me?

A. I don't think so.

Q. This case, sir, involves a matter in Feasterville on the evening of December 22, 1947, in which four men were involved, one of whom, David Darcy, is now on trial, and in which there was an alleged murder of one William Kelly. Do you know anything of that case?

A. Well, I saw headlines in the paper.

Q. Did you discuss the case in addition to seeing headlines in the paper?

A. Not to any extent.

Q. You said you did not?

A. No, I did not.

Q. Have you any opinion as to the guilt or innocence of this defendant, David Darcy?

A. I don't.

Q. Do you know David Darcy, this defendant?

266 A. I do not.

Q. Did you know the deceased, William Kelly?

A. No, sir.

Q. Do you know either of their families?

A. No, sir.

Q. What is your condition of health, sir?

A. I think it is good.

Q. You are not presently under the care of any physician?

A. No, sir.

Mr. Curtin: Commonwealth passes the juror.

By Mr. Achey:

Q. Where does your field of work lie? You said you are connected with the Bell Telephone Company of New Jersey.

A. All over southern New Jersey.

Q. You are not active in Bucks County, then, are you?

A. No, sir.

Q. Out of what office do you work?

A. Trenton.

Q. Are you a member of the town or borough council in Morrisville?

A. I am not.

Q. Have you ever held a position or followed the occupation of investigator?

A. I have not.

267 Q. Ever been a justice of the peace?

A. No, sir.

Q. You say you have read about this case which was tried last week?

A. I did not read about a case tried last week.

Q. Then you are not familiar with the facts in connection with this case?

A. No.

Q. Did you ever serve as a juror before?

A. Not in Pennsylvania.

Q. How long have you lived in Morrisville?

A. Eight years.

Q. Is all of your time taken up with your duties as construction superintendent?

A. That is right.

Q. You have the area from Trenton to Cape May?

A. That is right.

Q. All the way over to the coast?

A. That is right.

Mr. Achey: Defense accepts the juror.

* * *

268 VIRGINIA BRILLMAN, sworn.

By Mr. Achey:

Q. Is it Miss or Missis?

A. Missis.

Q. You live in Point Pleasant?

A. Yes.

Q. What is your husband's name?

A. William.

Q. Are you employed?

A. I am not right now.

Q. How long have you been married?

A. Four years.

Q. Have any children?

A. No.

Q. Have you read anything in the papers concerning this case?

269 A. Some.

Q. Have you formed any opinion as to the guilt or innocence of this defendant?

A. No, I haven't.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. What religious faith do you belong to?

A. Protestant.

Q. If you were accepted as a juror in this case would you be willing to render a verdict from the evidence as you heard it from the witnesses and under the instructions of the Court?

A. Yes, I would.

Mr. Achey: No challenge.

By Mr. Curtin:

Q. What is the condition of your health?

A. Well, I have been doctoring, but I am not awful sick.

Q. Are you currently under the care of a doctor?

A. Yes.

Q. Is your health such that it would be impossible for you to serve as a juror?

A. No, sir.

Q. For several days?

A. No, sir.

Q. What is your husband's occupation?

270 A. Carpenter.

Q. Do you know Mr. Achey?

A. No, sir.

Q. Do you know Mr. Power?

A. No, sir.

Q. Do you know either Mr. Biester or myself?

A. No, sir.

Mr. Curtin: Commonwealth accepts the juror.

The Court: Are you ready to swear the jury?

Mr. Biester: Commonwealth is ready, your Honor.

Mr. Achey: Defense is ready.

The Court: First call the jury, then swear them.

(Jury sworn.)

(Alternates sworn.)

Mr. Achey: I will object to the form of the oath as given to the alternates, Sir.

The Court: We will change it to meet your objection. William F. Hickey and Virginia Brillman stand up. I will administer this alternate oath.

(Alternate jurors sworn.)

* * *

830 (Discussion at side-bar.)

Mr. Biester: We offer to prove by CX-71 that it is a confession jointly made and executed by Harry R. Zietz, Harold Foster, David Darcy, and Felix Capone at about two o'clock in the afternoon of December 23, 1947, in which they agree that they are responsible for the commission of an armed robbery on November 30, 1947, of a place known as Ralph and Jim's Cafe at Waterford, New Jersey, at about 2:55 o'clock in the morning on that day.

That on December 3, 1947, about 1:50 o'clock in the morning they were responsible for the holdup and robbery of the Old Coin Inn on the White Horse Pike in Hammonton, New Jersey.

Also on December 3, 1947, between eleven o'clock and 11:30 p. m. they were responsible for the holdup of a place known as Mary's Tavern in Maple Shade, New Jersey.

I propose to interrogate Lieutenant Hanlon in reference to this alleged confession in order to have it proven, and then offer it in evidence to guide the

jury in fixing the penalty, assuming that the jury returns a verdict of guilty of murder in the first degree. The contention of the Commonwealth is that the jury is entitled to know who the defendant is, and for that purpose we can show any records or confessions of crimes in which the defendant is implicated.

Mr. Achey: I object to the offer first because the defendant not having appeared on the stand or tes-
831 tified or any evidence having been introduced in his behalf it is incompetent under the provisions of the Act of 1947, No. 505, which amends the Act of 1911, which lays down the rules affecting the right of the Commonwealth to submit evidence of commission of other crimes.

Judge Boyer: That applies only to cross examination.

Mr. Achey: I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge—

Judge Boyer: The Judges reserve the right to confer without being obligated to get the consent of defense counsel.

Mr. Achey: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant.

My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act in 1947.

The Court: The objection is overruled. Exception.

(Exception noted for defendant.)

• • •

No. 136. January Term, 1949.

IN THE

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH

v.

DAVID DARCY,

Appellant.

Appeal From Judgment of Sentence at No. 37, February Term, 1948, in the Court of Oyer and Terminer of Bucks County (Capital Case).

APPENDIX TO APPELLANT'S BRIEF.

MICHAEL von MOSCHZISKER,
THOMAS D. McBRIDE,
WEBSTER S. ACHEY,
104 N. Main Street,
Doylestown, Pa.,

Attorneys for Appellant.

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APPENDIX.

CHARGE OF THE COURT.

Ladies and gentlemen of the jury: This has been a rather lengthy trial. This was made necessary because, as it must be obvious to you, of the nature and importance of the case and the large number of witnesses who have testified. I have noted with satisfaction the patience you have exhibited throughout this trial and the careful and undivided attention you have given to the presentation of the testimony. We have now arrived at the point where the case is about to be submitted to you for your determination as to the guilt or innocence of the defendant under this indictment with which he stands charged.

I have no doubt that you have been impressed with the importance and seriousness of this trial and that you fully realize the very solemn duty that devolves upon you in determining your verdict. The questions propounded to you in your preliminary examination, before you were accepted and sworn as jurors in this case, were all asked because of the importance of this trial, both to the Commonwealth and to the defendant. They were asked because both the Commonwealth of Pennsylvania and the defendant are entitled to a jury who will weigh, consider, and pass upon the evidence in a fair, impartial, and dispassionate manner, uninfluenced by any sympathy, prejudice, passion, emotion, or by anything other than the facts in the case as you may find them to be from the testimony as you have heard it from the witnesses and the laws of Pennsylvania applicable thereto as received from the court.

You have been severally sworn or affirmed to "well and truly try and a true deliverance make between the Commonwealth of Pennsylvania and this defendant, David Darcy." It is your duty, therefore, under your oaths, to follow the

evidence withersoever it may lead you, to weigh and measure it carefully, in order to determine what you believe to be the facts surrounding this occurrence and then, having concluded from them, what you believe to be the truth, to apply the law to those facts, so found, and when you have done so, to render such a verdict as your consciences may dictate under the facts, the evidence, and the laws of Pennsylvania.

First of all, I want to impress upon you that you are a fact-finding body. You are the sole judges of the questions of fact involved in this case and you must ascertain these facts exclusively from the evidence that was submitted at the trial, not from anything you may have heard or read from sources other than the testimony of the witnesses at this trial.

In the course of this trial, you have heard the testimony of a large number of witnesses produced by the Commonwealth. The defendant has offered no testimony. That was his privilege and we say to you in this connection that the fact that the defendant did not testify in this case, or call any witnesses to testify in his behalf, does not create any presumption of guilt against him and should not have any influence upon you in arriving at your verdict. Under our criminal procedure a defendant may or may not testify in his own behalf, as he pleases, and where a defendant does not personally take the witness stand to answer the charges against him, the jury may not draw from the fact that he did not take the stand, any inference of guilt. In other words, his guilt must be established without the aid of any inference from his failure to take the stand and become a witness.

In addition to the testimony related to you by the witnesses, the district attorney and the counsel for the defendant, both able and learned men, in summing up the case have gone into the most minute details in their review of

the evidence and they have dissected and commented upon it in their arguments so that I will leave the testimony, for the most part, to your recollections. I repeat, to what I have already referred, that it is your duty as jurors, to pass upon the evidence and ascertain the facts and, whatever reference I may make to the testimony is not to indicate to you that it is the only part of the testimony that is of any importance in this case. On the contrary, all of the evidence is important and must be taken into consideration by you in determining your verdict.

Furthermore, it is your duty to recollect what the evidence was and, if reference to the testimony by the Court or by counsel in the case may differ or vary from your recollection of what the witnesses have testified, you will rely upon and accept your own recollection in preference to that of the Court and counsel, for it is not what counsel or the Court may have stated the evidence to be that must guide you in reaching your verdict, but rather your own combined recollection and yours alone, for you can very well understand that the combined recollections of twelve jurors is more reliable than that of one, two, or three individuals. Furthermore, if the Court or counsel have misquoted the testimony, you may rest assured that it was done inadvertently and not intentionally, and your better recollection must control your judgment. I say inadvertently, because neither of the counsel engaged in this case would intentionally misquote the testimony to a jury. It will be your duty, therefore, to take the proofs as you have heard them from the witnesses; to weigh them carefully; to look into the probability or improbability arising therefrom; to judge the credibility of the witnesses who have testified; and thus to reach your conclusion of fact.

The defendant, David Darcy, is on trial before you on the charge of murder. He is jointly charged in this bill

of indictment No. 37, February Sessions 1948, with three other persons, namely, Harold Foster, Harry Zietz, and Felix Capone, with having on the 22nd day of December 1947, in the County of Bucks, unlawfully and feloniously killed and murdered one William Kelly.

Although jointly indicted with three other defendants, only David Darcy is on trial before you, there having been a severance or separation of the defendant granted for the purpose of this trial. Under the laws of Pennsylvania, in all cases in which two or more persons are jointly indicted for felonious homicide, that is, murder, the parties charged shall have the right to demand separate trials. The defendant, David Darcy, having elected to be tried separately, he is, therefore, alone on trial before you, and you will have nothing to do with the other defendants named in the bill of indictment, excepting to consider them to the extent to which they were involved, that is, to the extent that the evidence may refer to them in describing the occurrence which ended in this alleged murder. Under this indictment, therefore, it will be your duty to determine from the evidence in the first instance, whether a crime was committed as alleged by the Commonwealth and, if so, whether the defendant committed it, that is, the guilt or innocence of the defendant, as we will hereinafter more explicitly instruct you. If you conclude that he is guilty, it will be your further duty to determine of what particular crime he is guilty under the law as given to you by the Court.

The killing of a human being at common law is known as homicide, and when there is an unlawful killing of a human being without legal justification or excuse it becomes a felonious homicide, that is, murder or manslaughter.

Murder at common law is where a person of sound mind, memory and discretion kills a reasonable creature in being in the peace of the Commonwealth with malice aforethought either express or implied.

At common law, any malicious killing was murder and there were no degrees to it. In Pennsylvania, however, the Legislature considering that there is a manifest difference in the degree of guilt where there has been an unlawful killing, depending upon the circumstances under which it was committed, has classified murder into two degrees, that of murder of the first degree and murder of the second degree.

The law in Pennsylvania with respect to the crime of murder provides: "all murder which shall be perpetrated by means of poison, by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree and all other kinds of murder shall be deemed murder of the second degree."

The act further provides: "And the Jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or of the second degree."

Of course, you will readily understand that the provisions of our law concerning a killing which shall be committed by means of poison or by lying in wait, is not applicable to your consideration in this case. I will, however, explain to you what is meant by wilful, deliberate and premeditated killing constituting murder in the first degree.

Murder of the first degree is where a felonious and malicious homicide, wilful, deliberated and premeditated, is committed with the specific intent to take life. It is the "intention to kill" that is the true criterion of murder of

the first degree and this intent must be carried out wilfully, deliberately and with premeditation. What is meant by "wilful, deliberate and premeditated"? "To kill" is to do an act of some sort which is the cause of the death of another.

The term "wilful" as used in our Act of Assembly means the same as "purposely," "intentionally." To kill a person "wilfully" is the same as killing him on purpose. Therefore, where there is a purpose or intention to kill existing in the mind of one who takes the life of another, it is a wilful killing. If he is entirely conscious of such a purpose and design, that is, if he fully knows and understands what he intends to do, it is deliberate. If he has had time fully to form the design it is premeditated. Hence, in order to constitute murder in the first degree described as "wilful, deliberate and premeditated," there must be a fully formed purpose to kill, with so much time for deliberation and premeditation to convince you, the jury, that this purpose is not the immediate result of rashness or impetuous temper, but that the mind was fully conscious of its own purpose or design. The law fixes upon no particular length of time as necessary to form the intention or purpose. It may be very brief. An intent distinctly formed, even for a moment before it is carried into effect is enough. Whether or not there was a sufficiently formed intent to kill is a fact to be determined by the jury, from all the testimony in the case. Neither is it necessary that the deliberation and the premeditation should continue for any particular length of time. An instant may be all the time necessary for one to form a determination, that is, to make up his mind to do a certain thing; so swift is the operation of the human mind. If there be time to frame in the mind, fully and consciously, the intent to kill; to select the weapon or means of death; and to consider and know, though the

time be short, the use to be made of it, then there is time to deliberate and premeditate. Therefore, where a person takes the life of another and it appears that he did so purposely, intentionally; that he had sufficient time to deliberate or think it over before acting and carrying this design or intention into execution, and that he was fully conscious of such purpose and design, that he was fully aware of what he intended to do and that there was sufficient time to enable his mind to fully frame the design or intent to kill and to select the weapon or means of death, or to frame the plans to carry this design or intention into execution, then that would be a wilful, deliberate and premeditated killing, and would constitute murder in the first degree.

Murder of the second degree is the unlawful and malicious killing of another, but where no specific intention or purpose to kill has been shown by the evidence, and such intent cannot be reasonably inferred from the attending circumstances. Where an unlawful and malicious killing is committed under the circumstances indicating an intent merely to do grievous bodily harm, but not to kill the person assaulted, then that would be murder of the second degree. It is murder of the second degree where there has been an unlawful and malicious killing of another, the outcome of a wicked and depraved heart, but where it was done without a specific intent to take life.

In both murder of the first and of the second degree malice must be present as an element of the act. The outstanding difference between murder of the first degree and murder of the second degree, is, as I have already stated, to constitute murder of the first degree it must appear that the act was done with the specific intention to take life. It is the intent to kill that is the essence of murder of the first degree, while in murder of the second degree the intent to

take life is absent and the intent is merely to do great bodily harm.

Now, under the laws of Pennsylvania, any unlawful killing of a human being is presumed to have been done with malice and to be murder, but this presumption in the case of murder described as wilful, deliberate, and premeditated killing, does not rise higher than murder of the second degree. Additional facts must be shown by the Commonwealth to raise it to murder of the first degree, and where the Commonwealth asks for a conviction of murder in the first degree the law places upon it the burden of proving beyond a reasonable doubt the intention to kill and disposition of mind constituting murder in the first degree described as "wilful, deliberate and premeditated" under the act of assembly or, that the murder was committed in the perpetration of or attempt to perpetrate certain felonies, designated in the act, including robbery. This proof, however, need not necessarily be express or positive but may be inferred from the surrounding or attending circumstances.

The law recognizes that circumstances surrounding a transaction may give rise to certain natural and reasonable inferences or deductions, that is, the intention with which an act, resulting in death was committed, may be inferred from the nature of the act or thing done. Perhaps the clearest evidence of an intent to kill can be inferred from the use of a deadly weapon, especially the unlawful use of such a weapon. Hence, where the evidence discloses that the death followed from the effects of the use of a deadly weapon at the hands of someone other than the deceased, the nature of the wound, as well as the character and kind of weapon are important facts to be considered. They are evidential circumstances to aid you in drawing your inferences and conclusions as to the degree of crime, of any, that

was committed. The kind of weapon used tends to indicate the purpose or intention with which it was used; the part of the body where the wound was inflicted should also be taken into consideration, as that might also throw some light upon the intention with which the act was done.

One who uses a deadly weapon upon another at some vital part with a manifest intention to use it upon him, must in the absence of qualifying facts be presumed to know that his act is likely to kill, and knowing this, must be presumed to intend death, which is the probable and ordinary consequence of such an act. Furthermore, when one so uses a deadly weapon upon another without sufficient cause or provocation, he must be presumed to do it wickedly or from a bad heart.

Now, in addition to murder, as we have just defined it, there is another grade of homicide, namely, manslaughter, but inasmuch as there is no evidence in this case of manslaughter, nor of any facts from which it may be reasonably inferred or that would warrant a conviction of that offense, the court will not instruct you beyond defining the offense.

Manslaughter is any unlawful killing of another without malice aforethought, as when one kills another in a fight arising upon a sudden quarrel, or in the heat of passion without time to cool, or upon great provocation. There is no evidence in this case that the deceased, William Kelly, was killed in a fight or quarrel or in the heat of passion or upon great provocation, therefore you need not consider this offense.

Malice is a necessary ingredient of murder, and as I have already told you, in both degrees of murder there must be malice. The question may naturally follow in your minds what is malice? Malice, in its legal significance is defined to be that condition or mind which is manifested in the intentioned doing of an unlawful act towards another without

legal justification or excuse. Malice is a term which includes not merely ill will, spite, or grudge toward another; it comprehends much more, and it exists in all those cases wherein are manifested cruelty or wickedness of disposition, hardness of heart, and reckless disregard of consequences. It is that condition of mind which shows a heart regardless of social duty and fatally bent on mischief even though a particular person was not intended to be injured. It includes not only anger, hatred or revenge, but every other intent to do an unlawful act which may probably deprive a person of his life or property or to inflict bodily harm.

Malice may be either express or implied. Express malice is where there may have been previous threats to kill or where there may have been old resentments or where it may be shown that there is proof or a motive prior to any attempt to kill or to inflict bodily harm. Malice may also be implied. That is, it may be inferred, for instance, from the use of a deadly weapon or where under circumstances which indicated that the consequences intended were either death or grievous bodily harm, if necessary to carry out their intended purpose. Malice is a state of mind and whether the death was brought about maliciously must be determined by the jury, and if the jury finds that malice is present in the unlawful killing of another, then the offense is murder.

These instructions which I have just given you as to what constitutes murder, described as wilful, deliberate and premeditated, and the difference between murder of the first degree and murder of the second degree become important for your consideration only in the event that you should conclude that the victim, William Kelly, was not killed during the perpetration of a robbery, but after it had been fully completed and ended.

Now, we have another offense described as murder in the first degree in our criminal code to which I will now refer. You have noticed from the reading of the Act of Assembly governing murder in the first degree that the Act specifies two situations wherein a felonious killing of a person constitutes murder in the first degree. First, whereas I have already described it, the killing was wilful, deliberate and premeditated. The second situation wherein the killing of a human being constitutes murder in the first degree is where the murder shall be "committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping." The defendant, in this case, is specifically charged by the Commonwealth along with his co-defendants, with having unlawfully and feloniously killed and murdered one William Kelly while engaged in the perpetration of a robbery.

When a murder is committed in the perpetration of a robbery, or any other of these felonies, it is not necessary for the Commonwealth, in order to establish the offense as one of murder in the first degree to prove premeditation and its specific intent to take life, that is, that it was wilful, deliberate, and premeditated.

Now, what is robbery? What constitutes robbery? Robbery, at common law, is defined as the felonious taking of money or goods of value from the person of another, or in his presence, against his will, by force or putting him in fear. It is a felony, that is, a very serious crime in the law.

In Pennsylvania we have a statute which defines robbery to be "whoever robs another, or steals any property from the person of another, or assaults any person with intent to rob him, or by menace or force, demands any property of another, with intent to steal the same."

We also have another section of the act which defines robbery with an accomplice or while armed or by violence. This provides "whoever, being armed with an offensive weapon or instrument, robs or assaults with an intent to rob another, or, together with one or more person or persons robs or assaults with intent to rob; or robs any person, and at the same time or immediately before or immediately after such robbery beats, strikes or ill uses any person, or does violence to such person, is guilty of the offense of armed robbery," or robbery by violence.

Now, one of the first questions you will have to determine is whether or not a robbery took place at the Feasterville Tavern on the night of December 22, 1947, as testified to by a large number of witnesses. That is, you must determine whether the conduct of the defendant, David Darcy, and his companions or co-defendants, was such as to constitute the offense of robbery as we have defined it. I am not going to review all of the testimony of these witnesses at length. That is for your recollection.

Briefly and substantially, it is to the effect that on that night, about 11:52 P. M., the defendant, David Darcy, and his two companions, Harold Foster and Harry Zietz, entered the Feasterville Tavern; that there were approximately eighteen persons in the tavern at the time, of which six were in the shuffleboard room and twelve in the barroom proper. You had the opportunity to visit the premises to better enable you to understand the description of the premises and the various places therein from the witnesses.

The proprietor of the premises was John R. Naysmith, who, at the time the defendant and his companions entered, was standing behind the bar. The defendant and his companions were all strangers to Mr. Naysmith, he never having

seen them before, according to his testimony. Two of the men, Harold Foster and the defendant, David Darcy, went up to the bar behind which Naysmith was standing, while Harry Zietz, the other companion stood in back of them. Darcy asked him where the men's room was located. Naysmith told him, and then went into the kitchen for a sandwich. When he returned he heard a thud or bump and upon looking around saw Foster standing behind the bar in front of the cash register with a gun pointing at Naysmith and saying, "This is a stick-up." Naysmith's wife at this time was in the kitchen. Foster went into the kitchen and a few minutes later Mrs. Naysmith came out into the barroom followed by Foster with a gun pointing in her back. Mr. and Mrs. Naysmith stood behind the bar at one end while Foster took a position in front of the cash register with a gun pointed at them. Then Naysmith heard two shots coming from behind him. These shots, according to other witnesses, were fired by the defendant Darcy, while somewhere near the door leading from the barroom into the shuffleboard room. It appears that Darcy had gone back to the doorway leading into the shuffleboard room and asked someone, I think it was Hellerman, where the men's room was located. He entered the men's room momentarily and reappeared and said to the occupants of the shuffleboard room, "Stick 'em up," to which Allen Hellerman, who, at the time was engaged in the playing of shuffleboard and standing at the end of the board nearest the barroom, say, "Are you kidding?"

At that time there were two shots fired by Darcy, who was standing in the doorway. They were pointed at Hellerman's feet. Hellerman went after him and a scuffle followed between the two. Then Edward Wunsch, who was playing at the opposite end of the board farthest away from the doorway, ran to Hellerman's assistance, and there was a

scuffle between Darcy and Wunsch. Then some more shots were fired. After the shots, Wunsch turned around and came into the shuffleboard room and said, "I am hit," and sat down. His father-in-law, Mr. Hughes, later removed Wunsch from the premises. According to Wunsch, he saw the defendant, Darcy, in the doorway and heard him ask for the men's room. Less than three minutes later, Darcy again appeared in the doorway with a gun in his right hand and pointed at Mr. Hellerman and said, "This is a stick-up," and fired two shots in rapid succession. Hellerman went after him and he, Wunsch, went to the rescue. He grabbed Darcy first at the throat and his hold slipped off to the shoulder. During the scuffle Darcy was firing his gun at Wunsch and he suddenly found his right arm and shoulder were hit, he then saw Hellerman, also described as "Reds," lying on the floor. Wunsch does not know who shot him, but from other witnesses who have testified, not only was Darcy shooting at Wunsch but Zietz also came over from where he had been standing, and fired over Darcy's shoulder during the scuffle. Wunsch testified that Darcy fired more than three shots at him while he was fighting, one of which went through his trousers. The testimony further revealed that during this scuffle with Darcy, both Wunsch and Hellerman were shot and seriously wounded.

According to Frank Fronsdale, after this scuffle, Darcy came over to him and said, "Put your hands up, get them up," poking him in the ribs with the gun, and moved him over to the wall along the Bustleton Pike along with the other patrons. He told them to get their wallets out and put them on the bar, which they did, and Foster took the money out of them and put it into his pocket. Darcy then said, "Get your watches off," and you will remember that he took the watches from a number of the patrons and put

them in his pocket; that before the patrons were ordered to give up their watches, it appears that Darcy stepped up and said, "Where is the hero that hit me? Why doesn't someone take this gun off me? I feel like shooting someone else," and that he turned toward the doorway and said, "Where is the police? I feel like shooting some of them." No one replied, then Darcy demanded the watches. You will also recall that one of the witnesses testified that Darcy, in a threatening manner, came up to him and waved the gun or revolver in front of his nose when he made the demand.

Foster in the meanwhile was taking the money out of the wallets and also out of the cash register, after which he grabbed a bottle of whiskey from behind the bar, jumped back over the bar and walked towards Mr. Hellerman who was lying on the floor of the tavern therein, kicked or nudged him and said, "He is not dead yet, he is still breathing," whereupon Zietz went over and took Hellerman's hat and said, "You won't need this again."

Darcy in the meanwhile, who was standing near the jukebox, was shooting at the telephone. He made several attempts to fire at the telephone, without success, and said, "My gun doesn't work." It also appears that he, or one of his companions, you will recall, then tore the wiring off of the telephone. Then they all walked towards the doorway, Zietz and Darcy going out first, Foster stood at the doorway waving his gun and said, "I don't want you to move for some minutes." Then he went out and shortly reappeared in the doorway and said, "I said not to move for a few minutes," and then looked up at the Christmas decorations and said finally, "I wish you all a very merry Christmas," and then disappeared.

Now, members of the jury, that is a brief sketch of what

occurred in the barroom. This testimony was offered to you to show what was going on there, and why these defendants came there, and what they did while there.

The Court does not recall the aggregate sum of money taken from the patrons, but Mr. Naysmith, the proprietor, testified that Foster took $78 from the cash register and $2 from his pocket. There were a number of watches and a considerable sum of money taken in the aggregate from the patrons. The other defendant, Felix Capone, it appears was remaining outside a short distance from the tavern in an automobile, headed toward Newton, with the engine running.

While this confusion was going on within the tavern, Winnie Leutwyler, a friend of Allen Hellerman's, got out of the shuffleboard room through a rear door, and ran over across the road to the Buck Hotel, which was also pointed out to you when you visited the scene. She was greatly excited. When she arrived there she found Victor Schiavoni behind the bar and William Kelly in front of the bar. She told them there was a shooting going on over at "Brownie's." Kelly grabbed her to try to keep her back but she eluded him and went back to the shuffleboard room, which she said she almost immediately left again and hid behind a small building.

Now, you will also take into consideration what took place outside of the tavern at or about the time of this alleged robbery, particularly what occurred in the immediate vicinity of the tavern, because it is what happened outside of this tavern shortly after what took place in the inside that is the basis of this charge of murder against this defendant.

I have referred to the fact that Winnie Leutwyler had gone across the street to the Buck Hotel and told the bartender and William Kelly what was going on in the tavern.

Frank J. Walter, who was also called as a witness, was at the Buck Hotel about the same time, and he was a friend of William Kelly. You have had the benefit of his testimony. He stated that Kelly, after hearing Miss Leutwyler's report of what was going on at the tavern, tried to restrain Miss Leutwyler from going back, but that she eluded him. That Kelly and he then went outside and stood at the intersection of the Churchville, Newtown, and Bustleton Roads, or Langhorne Road, you will recall; it was pointed out to you on the photographic exhibits as well as on the plan just where they were standing. While there Horace Patterson came driving up out of the Churchville Road and after making a part of a left turn stopped. While standing there they saw an automobile in front of the Feasterville Tavern headed towards Newtown. It was a 1939 Plymouth with the grille pushed in and the left headlight was out. The engine was running. While there they saw two men run up along the porch from around the corner of the Feasterville Tavern and get into the car. One of the men got into the driver's seat and the other went around to the other side. Patterson's car at this time was pointed towards the beauty parlor. Then a third man came running out and got into the car. They stayed there for a moment, they turned the lights on and then turned them off, they started the car up the Newtown Road, then he heard two shots and Kelly fell. According to Walter when these shots were fired the car was just about entering the Newtown Road about ten or twenty feet from where he and Kelly were standing.

Walter tried to assist Kelly, but he found he was covered with blood, and then Patterson got out; while Walter went to the Buck Hotel to call for assistance. Later both Patterson and Walter testified that they heard Kelly say, "Who were they? Why did they shoot me? Look, I am

paralyzed." He later became unconscious and was removed to the Abington Hospital where he was treated and where he died the next day, December 24, 1947, about 7:40 P. M. The cause of death, according to Doctor Laycock, who was one of the surgeons in attendance at the hospital, was hemorrhage as the result of a headwound and fracture.

An autopsy was held by Doctor Simpson, the coroner's physician of Montgomery County. You have the benefit of his testimony, and he corroborated Doctor Laycock's conclusions that the cause of death was cerebral hemorrhage due to a fracture of the skull.

Now, members of the jury, in addition to the testimony which I have briefly reviewed, there was other testimony as to what occurred. It may vary somewhat, but that is natural because there were so many eye witnesses, and it is understandable that some would see something which others did not observe or notice.

According to the witnesses, there were a large number of shots fired, and so far as it appears they were all fired by the defendant David Darcy and his two companions, Foster and Zietz; Capone not having appeared inside of the tavern, so far as the testimony discloses.

There was also the testimony as to the injuries which both Hellerman and Wunsch sustained at the hands of one or the other of the defendants, Darcy or Zietz. It was testified it was they who were firing during this scuffle during which these two persons were wounded. Now we say to you that if you accept the theory of the Commonwealth that these four young men went to the Feasterville Tavern for the purpose of committing a robbery or a "hold-up" or "stick-up", as they called it, and that in the furtherance of their common purpose or object they committed violence upon any of the patrons or put them in fear of

violence, then it constitutes the offense of robbery, and not only robbery, but aggravated robbery, as we have defined it under the statute of Pennsylvania, that is, robbery by violence.

Now, what does this occurrence within the tavern indicate to you? Does this constitute a robbery? Was it a robbery by force or violence? Who perpetrated this robbery? Was it perpetrated by a single individual, or were there others involved in it? If so, was the defendant one of them? Were they all acting together in concert, that is, with a common purpose in a common enterprise?

It was testified that the defendant together with Zietz and Foster entered the tavern together while another of their party remained outside in a car parked alongside of the tavern, with the engine running. That the defendant and his two companions were armed, and that they used their weapons while in the tavern. That one of them, Foster, stationed himself at the bar at one end of the taproom, Zietz at the other end of the room near the door, while Darcy went to the rear of the barroom, and after investigating the men's room fired two shots in the doorway leading to the shuffleboard room, and that one or more of the men, if not all, you will recall, announced to the patrons, "This is a stickup."

What does this indicate to you? Is or is it not consistent that these four men came to the tavern for the purpose of committing a robbery in pursuance of a pre-arranged plan, prepared to use violence if necessary to carry out their purpose, even to killing someone, if necessary? This is a question you will have to pass upon in determining whether or not the defendant is guilty of the crime charged, and for which he is on trial before you.

Although there was no direct testimony as to who fired

the fatal shot at Kelly and from the result of which he died, there was evidence by the men who were standing in the roadway that two shots were fired in rapid succession. There is also evidence that on the following morning it was found that a shot had passed through a window of a house, known as the "Hogeland House" located across from the Feasterville Tavern, and that the bullet or slug was found on the window base or sill. This became important in order to determine out of whose gun the shot may have been fired. You have the benefit of the ballistic expert who examined the defendants' guns found upon Darcy and his co-defendants, and his conclusions or opinions and the reasons therefor. According to this witness, the shot came from the gun attributed to Harry Zietz. This would seem to be corroborated by Zietz's admission or confession, which was later received into evidence that it was he who fired the shots as they were leaving the tavern.

The Commonwealth alleges that the deceased, William Kelly, was shot and killed during the perpetration of a robbery. The question may arise in your minds, what is meant by perpetration; and whether or not the robbery had been completed before the fatal shot occurred and, therefore, whether it was done during the perpetration of a robbery, if you find a robbery was committed.

We instruct you that under the law the perpetration of a robbery, under circumstances such as have been related and described in this case, is not confined to what may have occurred inside of the tavern, that is, the actual taking of money and other valuables from the owner and patrons by violence or by putting them in fear, but it also includes and covers their escape or flight from the scene of the crime.

The law regards the escape of robbers with their ill gotten gains as an incident to the robbery itself and just as

important to the execution or perpetration of the robbery as gaining possession of the money and valuables taken therein.

You will note that our Act of Assembly, which I have just read to you, specifically provides that whoever, in the commission of a robbery by violence "at the same time, or immediately before, or immediately after such robbery, beats, strikes, or ill uses any person, or does violence to such person," is guilty of robbery or aggravated robbery. There appears to have been no reason for the firing of these shots as the result of which Kelly was killed. There is nothing to indicate that Kelly or his two associates did anything whatsoever to interfere with the defendants in whatever they were engaged. Therefore, it is for you to draw the conclusion whether or not these shots were fired by reason of the robbery that had been staged in the tavern to prevent or discourage pursuit, that is, whether the shots were fired in the attempt of the defendant and his companions to flee or escape from the scene of their "stickup" "holdup" or robbery, as it has been variously described. If you conclude that the defendant's and his co-defendants' acts of departure from the tavern was continuous of the robbery which occurred inside, if you find there was a robbery, and that the fatal shot was fired in their flight or escape, and you are satisfied of this fact beyond a reasonable doubt, then the killing of William Kelly would constitute murder committed in the perpetration of a robbery.

And, moreover, if you should find that at the time this fatal shot was fired at Kelly by one of the occupants of the automobile in which the defendant was at that time also an occupant, in their attempt to escape, after having committed a robbery, in pursuance or furtherance of the common design or plan, then all of the occupants of the fleeing car from which this fatal shot was fired are equally guilty of

the murder of William Kelly, even though such killing may not have been a part of such prearranged plan, and it would constitute murder in the first degree.

The Commonwealth does not contend or allege that the defendant David Darcy actually fired the shot which killed William Kelly, but it does contend that William Kelly was killed either by the defendant or by one of his co-defendants, or accomplices, while acting in concert in the perpetration of a robbery and, therefore, he is equally guilty with the person who actually fired the shot, of murder in the first degree.

Under the law, when two or more persons form or enter upon a common design or purpose which contemplates the commission of a criminal offense this constitutes a conspiracy, and each person entering into the common enterprise or adventure is a conspirator, and when a conspiracy or agreement is enter into between several persons to do an unlawful act, all persons who engage therein are equally responsible for all that is done in pursuance thereof by any one of their co-conspirators or accomplices until the object for which the conspiracy was entered into was fully accomplished. This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into but it extends to and includes all collateral acts incident to and a part of or growing out of the common design. Therefore, if you should find beyond a reasonable doubt that the defendant, David Darcy, along with his companions and co-defendants, Foster, Zeitz, and Capone, were all parties to a plan or agreement, that is, that they acted in concert to rob, and that William Kelly was killed by one of these four defendants while carrying out that unlawful purpose, then David Darcy would be equally guilty with the other defendants, even though he may not have actually fired the shot which killed Kelly.

This is for the reason that under the law where the parties to a common purpose show by their conduct and equipment, an intention to use as much force as may be necessary to accomplish their purpose, and, in furtherance of the common design or objective if a person is killed, all are equally guilty of the crime of murder in the first degree.

Now, members of the jury, when you retire to the jury room for your deliberations, you will approach the consideration of this case with the assumption that the defendant is innocent of the crime charged or of any other criminal offense. In this case, as in every criminal case, the defendant comes into court cloaked with the presumption of innocence, and that presumption is a real right which he possesses and which remains with him throughout the trial and until you have reached the point where you are satisfied beyond a reasonable doubt of his guilt. Therefore, before you can convict this defendant of the crime with which he is charged, the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt.

Again, this defendant, like all defendants in a criminal case is entitled to the benefit of any reasonable doubt which may arise from the evidence. The presumption of innocence, as I have already told you, abides with the defendant until the Commonwealth have proved his guilt beyond a reasonable doubt.

By "reasonable doubt" is meant, as indicated by the term itself, a doubt which is reasonable, one that appeals to reasonable men and women, not such a doubt that is sought for or imagined to exist or conjured up in one's mind in order to avoid the discharge of an unpleasant duty, but it is a doubt which fairly and reasonably and honestly arises out of the evidence, or the lack of evidence, or from a conflict in the evidence, and presents itself, and is such as would becloud or confuse your judgment and prevent you from

arriving at a satisfactory conclusion. It is more than a mere possible or conceivable doubt, because everything relating to human affairs and depending on oral testimony is open to some possible or imaginary doubt. A "reasonable doubt" is of a real, fair, and substantial nature. It is such a doubt as would cause a careful, prudent person, before engaging in matters of importance to himself, to pause and hesitate before acting. If there is, in this case, such a doubt in your minds as to the defendant's guilt, it is your duty to give the benefit of it to the defendant and acquit him. But, if after having considered all of the evidence in this case, including the spoken testimony and surrounding circumstances, you have no such reasonable doubt of the defendant's guilt of the offense, as charged by this bill of indictment, then it is your duty, as the sworn jurors in this case, to render a verdict of guilty of the offense, as you may find the evidence warrants.

Now, in passing upon the question of reasonable doubt, this may give rise to the question of credibility, which you may attach to the testimony of these witnesses. It is your duty to weigh the testimony of these witnesses as they have testified before you and determine what credibility you will attach to it. Furthermore, where they is any conflict in the evidence from the witnesses you should try to reconcile it if you can, but if you can not reconcile it then accept that which you believe to be the truth.

Now, as to how to pass upon the credibility of witnesses, the Court can not be of very much assistance, except we may suggest that in weighing the testimony of a witness and the credibility you will attach to it, you will take into consideration the familiarity of the subject matter of his testimony, that is, the opportunity he may have had for

having seen or heard and knowing the things about which he has testified. You will also take into consideration the witness's manner on the witness stand, and how did he impress you. Did he impress you as being an open, frank, and honest witness in his manner, or did he appear to be as if he were trying to conceal something?

You will also take into consideration the reasonableness and probability of the story which he has told in the light of the testimony of the other witnesses, and the stories they have related. Was his testimony corroborated by the testimony of other witnesses or by surrounding circumstances as to the facts of which you are satisfied or convinced?

Also take into consideration how he withstood cross-examination. These are merely suggestions of matters you may take into consideration in passing upon the credibility of a witness's testimony.

In this case a number of circumstances have been introduced and referred to in the course of this trial. We have already told you that it is not only your duty to take into consideration all the spoken testimony but also the surrounding facts and circumstances connected with the case. While the Commonwealth must establish the defendant's guilt beyond a reasonable doubt, it is not necessary that the proof be by the direct evidence or testimony of witnesses who actually saw the occurrence but such guilt may be established by proof of facts and circumstances from which it may be fairly, reasonably, and satisfactorily inferred beyond every reasonable doubt. Such evidence is known in the law as circumstantial evidence and it is frequently just as convincing as direct testimony, but it must be just as convincing and the facts and circumstances must satisfy you of the guilt of the defendant beyond a reasonable doubt, before you may convict the defendant upon circumstantial evidence alone.

Therefore, if you should find from all the facts and cirstances in evidence before you that there is no other reasonable conclusion than that the defendant is guilty, then it will be your duty to convict him; but to convict the defendant on circumstantial evidence alone, the circumstances proven must be consistent with one another and must, when taken together, point so conclusively to the defendant's guilt as to exclude every reasonable hypothesis or theory except that of the defendant's guilt.

There was evidence offered and admitted in this case showing that after the defendant and his companions left the Feasterville Tavern they went in an easterly direction on the Newtown Road. There was also evidence of another robbery or hold up committed by these defendants a short time after the Feasterville Inn occurrenee that same night or early morning of December 23 at an inn along the Lincoln Highway near South Langhorne, known as "Deacon's Inn," and located a few miles distant from the Feasterville Tavern.

Now, we call your attention that this defendant is not charged with and is not on trial for the commission of any offense at Deacon's Inn and you will please bear that in mind during your deliberations. This evidence was offered and received not as proof of the commission of the offense of robbery at the Feasterville Tavern, but it having occurred so soon after the affair at the Feasterville Tavern, and in the same vicinity, that it was received as showing a course of conduct on the part of the defendant and his companions and also as showing that it constituted a chain of closely connected crimes for the common purpose of obtaining money by robbery.

The details of what occurred at "Deacon's Inn" are not very important, excepting as to whether or not the holdup

at South Langhorne was so nearly like the one at Feasterville in its detail, plan, or scheme that it might indicate not only a course of conduct but a well prepared plan or system. There were also certain statements made by the defendants, including Darcy, as to what had occurred at the Feasterville Tavern.

The second reason why it was received is because the facts of the occurrences may throw some light upon the character of the defendant and help to show you, the jury, the manner of person he was, for reasons which we will explain more fully later.

Now, there was also evidence offered in this case by the Commonwealth purporting to be voluntary statements made by the four defendants to Bucks County Detective Russo, in the presence of other officers, including Lieutenant Hanlon and several State Police detectives in the office of the Philadelphia Police Detective Bureau for the Fourth District. You have heard the testimony of Lieutenant Hanlon, how the statements were made; they were oral statements and subsequently taken down in the form of questions and answers, which were read to you, which statements were signed by all of the defendants.

We admitted these statements into evidence because, according to our recollection, in the Commonwealth's testimony there was nothing to indicate or show that they were obtained or elicited from the defendant, or any of his companions, by any promises, threats, duress, or any other improper influence, but that on the contrary they were made freely and voluntarily. If, however, the Court is in error and you conclude from all the evidence before you that these statements were obtained improperly, that is, by force or duress, or any other improper inducements, then they must not be considered by you.

These statements were received as evidence in a case of

this kind upon the theory that it is a declaration made by the defendants charged with a crime against their own interest. What the defendant said against himself, if anything, the law presumes to be true, because it is against himself. Confessions, however, are like other evidence, in that you must determine what statements contained therein are true and what are not true. If you conclude it was properly obtained, you will consider the whole of this confession with all the other testimony in the case. It is for your consideration under all the evidence or circumstances in the case how much of this confession you may deem worthy of belief.

Now, you will find included in these confessions or admissions by these defendants, including Darcy, reference to a number of other robberies having been committed or attempted to having been committed by them. I believe Darcy was not in one of them; perhaps there were others that you will remember. These confessions with respect to these prior crimes or their prior records were admitted only for one purpose, as was the testimony of what occurred at the Deacon Inn, namely, to provide you with information which may throw light upon the character of the defendants so that you may know, in the event of a conviction of murder in the first degree, what manner of man the defendant David Darcy was, as to better enable you to fix the punishment for the offense. These references to these other independent crimes must not be considered by you as proof of the commission of the offense alleged to have occurred at the Feasterville Tavern.

In this case, as we view the evidence, there can be one of several verdicts: murder in the first degree; murder in the second degree; or not guilty. As I have already told you, you can not return a verdict of manslaughter.

If you find, as the Commonwealth contends, that William Kelly met his death at the hands of either the defendant or one of his companions while engaged in the common purpose or design of perpetrating a robbery at the Feasterville Tavern, then your verdict will be "guilty of murder in the first degree." You cannot render a verdict of murder in the second degree where you find that the victim was killed during the perpetration of a robbery.

A verdict in the second degree can be rendered only in those cases wherein there may be a question under what we defined to you as being "wilful, deliberate, and premeditated murder," and a jury finds that there was no intention to kill. It has no application to where the offense was committed, as I have just stated, during the perpetration of a felony, such as robbery, burglary and the felonies named in the act of assembly.

Therefore, if you conclude beyond a reasonable doubt that William Kelly was killed during the perpetration of the robbery and that the defendant was one of the party acting in concert with the person who actually fired the fatal shot, then your verdict will be "guilty of murder in the first degree."

If, however, you are not satisfied of this fact beyond a reasonable doubt, then your verdict will be "not guilty." I repeat, these are the two possible verdicts in the event you conclude this murder was committed during the perpetration of a robbery.

If, however, you should find that the robbery had been fully completed and abandoned, and that the fatal shot was not fired during the escape or flight from the robbery, then you will have to determine whether it was fired at Kelly with a wilful, deliberate and premeditated intent to kill him, while the defendant was acting in concert with the man who fired the shot. If you so find, it will be murder in the first degree.

If you should find it was not done to kill him but merely to injure him, then it would be murder in the second degree.

Now, in the event that you should find the defendant guilty of murder in the first degree, then under our Act of Assembly you will have another duty to perform. The law places upon juries, where they render a verdict of guilty of murder in the first degree, the duty to impose the punishment, or penalty, for the crime. You may fix it at either death or life imprisonment. Unfortunately, the Act of Assembly does not throw very much light on the question of when and under what circumstances the death penalty should be imposed, or under what circumstances life imprisonment only should be imposed, but leaves it to the sound discretion of the jury.

You will, of course in inflicting the penalty, take into consideration all the facts and circumstances, as you may determine them to be, and then use your good, sound, honest judgment. I may say that the law and the courts recognize a distinction as to the penalty to be inflicted in murder of the first degree, and our Supreme Court is on record as stating that when a murder is committed in the course of a robbery, the death penalty, in the absence of mitigating or extenuating circumstances is, to say the least, not viewed with disfavor by the law.

In determining the question as to what the penalty shall be, in the event you convict the defendant of murder in the first degree, it will be entirely proper for you to take into consideration whether or not there are any extenuating or mitigating circumstances as to the defendant's guilt in this case.

Members of the jury, we do not wish to be understood that we express any opinion as to what your verdict shall

be or what, in the event of a verdict of guilty of murder in the first degree, what the penalty shall be. That is your problem and your duty as you may conclude from the evidence and the law as we have given it to you.

Have I overlooked anything? Are there any corrections to be made?

MR. ACHEY: Nothing for the defendant, your Honor.

THE COURT: Members of the jury, a word in conclusion. I have instructed you as to what I understand to be the law bearing upon all the questions that arise in this case, as well as the substance of the testimony bearing upon the shooting, as I recall it. I trust I have made myself clear and that I have succeeded in giving it to you so that you comprehend and understand it. What does it indicate to your minds as jurors?

I may add that in the rendition of your verdict, if you convict this defendant of murder in the first degree, then you will not only have to announce the verdict, but also to announce the punishment, what the punishment shall be.

MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.

THE COURT: I specifically stated it was completely abandoned in the case of flight or escape.

That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery.

MR. BIESTER: I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not.

THE COURT: If I did, that will be withdrawn.

MR. ACHEY: I ask for an exception, a general exception, to the charge of the Court.

THE COURT: Exception will be allowed.

(Exception noted for defendant.)

THE COURT: Members of the jury, you will now retire.

MR. BIESTER: Your Honor, will you direct that the prisoner be remanded pending the return of the jury?

THE COURT: Yes. The prisoner will be remanded to the sheriff and returned to the County Prison.

VERDICT OF THE JURY:

THE COURT: The clerk will please note that the defendant and his counsel are present in court.

JURY CALLED:

THE COURT: David Darcy, will you please rise.

THE CLERK: Members of the jury, have you agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: Jurors look upon the prisoner. Prisoner look upon the jury. Members of the jury, have you agreed upon your verdict in the issue joined between the Commonwealth of Pennsylvania vs. David Darcy on Bill No. 37,

February Sessions 1948, 1st Count Murder; how say you, do you find the defendant guilty or not guilty?

THE FOREMAN: Guilty of first degree murder.

THE CLERK: And the penalty?

THE FOREMAN: Death.

MR. ACHEY: If your Honor please, I ask the jury be polled.

THE COURT: The jury will be polled.

THE CLERK: W. D. Pardoe, how say you, guilty or not guilty?

JUROR No. 1 (W. D. PARDOE): Guilty.

THE CLERK: Guilty of what?

JUROR No. 1: Murder in the first degree.

THE CLERK: And the penalty?

JUROR No. 1: Death.

THE CLERK: Anna W. Bucher, how say you, guilty or not guilty?

JUROR No. 2 (ANNA W. BUCHER): Guilty of murder in the first degree, with the penalty of death.

THE CLERK: Marvin D. Weidner, how say you, guilty or not guilty?

JUROR No. 3 (MARVIN D. WEIDNER): Guilty of murder in the first degree, with the penalty of death.

THE CLERK: Jesse H. Horne, how say you, guilty or not guilty?

JUROR No. 4 (JESSE H. HORNE): Guilty of first degree murder, with the penalty of death.

THE CLERK: Oliver C. Landis, how say you, guilty or not guilty?

JUROR No. 5 (OLIVER C. LANDIS): Guilty.

THE CLERK: Guilty of what?

JUROR No. 5: First degree murder.

THE CLERK: And the penalty?

JUROR No. 5: Death.

THE CLERK: Franklin T. Fretz, how say you, guilty or not guilty?

JUROR No. 6 (FRANKLIN T. FRETZ): Guilty.

THE CLERK: Guilty of what?

JUROR No. 6: First degree murder; penalty of death.

THE CLERK: Roger Mason, how say you, guilty or not guilty?

JUROR No. 7 (ROGER MASON): Guilty.

THE CLERK: Guilty of what?

JUROR No. 7: Guilty of first degree murder.

THE CLERK: And the penalty?

JUROR No. 7: Death.

THE CLERK: Howard Price, how say you, guilty or not guilty?

JUROR No. 8 (HOWARD PRICE): Guilty of first degree murder.

THE CLERK: And the penalty?

JUROR No. 8: Death.

THE CLERK: L. Calvin Fluck, how say you, guilty or not guilty?

JUROR No. 9 (L. CALVIN FLUCK): Guilty of first degree murder.

THE CLERK: And the penalty?

JUROR No. 9: Death.

THE CLERK: Elva A. Shive, how say you, guilty or not guilty?

JUROR NO. 10 (ELVA A. SHIVE): Guilty.

THE CLERK: Guilty of what?

JUROR NO. 10: First degree murder. Death.

THE CLERK: Penalty of death?

JUROR NO. 10: Yes.

THE CLERK: Ruth G. Bliss, how say you, guilty or not guilty?

JUROR NO. 11 (RUTH G. BLISS): Guilty.

THE CLERK: Guilty of what?

JUROR NO. 11: Murder in the first degree; penalty death.

THE CLERK: Ann L. Reed, how say you, guilty or not guilty?

JUROR NO. 12 (ANN L. REED): Guilty.

THE CLERK: Guilty of what?

JUROR NO. 12: First degree murder.

THE CLERK: And the penalty?

JUROR NO. 12: Death.

THE CLERK: Your Honor, the jury has been polled individually and they have agreed. Shall the verdict be recorded?

THE COURT: The verdict may be so recorded.

THE CLERK: Members of the jury, harken unto your verdict as the Court has recorded it. In the issue joined between the Commonwealth and David Darcy you say you find the defendant guilty of murder in the first degree and the penalty shall be death, in the manner and form as he stands indicted, so say you all?

(All answer yes.)

Mr. ACHEY: If Your Honor please, I desire to make an oral motion for a new trial, and a motion in arrest of judgment as to the motion for a new trial, and I ask leave to file additional reasons in writing within ten days after the official transcript of the notes of testimony have been filed.

THE COURT: The motion will be allowed. I suggest that you make a written motion within four days.

Mr. ACHEY: I will file the written motion immediately, sir, with the stock reasons.

THE COURT: The prisoner may now be remanded in the custody of the sheriff for return to the County Prison, pending a motion for a new trial.

OPINION

Sur Motion for a New Trial.

The defendant, David Darcy, was indicted with three others, Harold Foster, Harry Zietz and Felix Capone, for the unlawful killing on December 22, 1947 of one, William Kelly, during the perpetration of an armed robbery. Separate trials were asked by the above named defendant, David Darcy, and Felix Capone, and granted. Foster and Zietz were tried jointly. All three of the defendants, Darcy, Foster and Zietz were convicted of murder of the first degree with the death penalty. The defendant, Capone, entered a plea of guilty, and his case is awaiting final disposition. At the time the defendant did not take the witness stand or offer any testimony in his behalf.

All three of these defendants, so convicted, have filed motions for a new trial. This case which we are passing upon involves only the appeal of the defendant, David Darcy.

Briefly and substantially, the facts as developed by the testimony are as follows: On the night of December 22, 1947, about 11:25 P. M. the defendant, David Darcy and his three companions, Harold Foster, Harry Zietz and Felix Capone, arrived at the Feasterville Tavern, a tap room located at the junction of the Churchville-Newtown-Bustleton Roads, in the village of Feasterville, Bucks County, Pennsylvania. Three of them, Darcy, Foster and Zietz, entered the tavern while Capone remained outside in the automobile. There were approximately eighteen persons congregated in the barroom and shuffle board room, of which six were in the shuffle board room and twelve in the barroom proper. The proprietor, John R. Naysmith, at the time of the entry was standing behind the bar. The defendant and his companions were all strangers to him. Two of the men,

Foster and Darcy, went up to the bar, while Zietz stood behind them. Darcy asked Naysmith where the men's room was located. Naysmith then went into the kitchen on an errand and when he returned he heard a thud or bump and upon looking around saw Foster standing behind the bar in front of the cash register with a gun pointed at Naysmith saying: "This is a stick up". Foster then went into the kitchen and a few minutes later Mrs. Naysmith came out into the barroom followed by Foster with a gun pointing at her back. Foster then took a position in front of the cash register with a gun pointed at both Mr. and Mrs. Naysmith. Then Naysmith heard two shots coming from behind him. These shots, according to eye witnesses, were fired by the defendant, Darcy, while somewhere near the door leading from the barroom into the shuffle board room. It appears Darcy had gone to the doorway leading into the shuffle board room and asked the location of the men's room. Upon being told, he entered this room momentarily and re-appeared and said to the occupants of the shuffle board room: "Stick 'em up", to which one Allen Hellerman, who was engaged in playing at shuffle board, said: "Are you kidding?" Darcy then fired two shots at Hellerman who went after him and a scuffle followed between the two during which Hellerman's companion, Edward Wunsch, ran to his assistance. Several more shots were fired by Darcy and Zietz, resulting in both Hellerman and Wunsch being severely wounded. After this scuffle, Darcy went over to a number of the patrons in the tavern and demanded that they put their hands up, poking them in the ribs with his gun. He then told them to get their wallets out and put them on the bar, which they did, and Foster took the money out of the wallets and put it into his pocket. Darcy then demanded that they take off their watches, Darcy taking the watches from a number of patrons and put them

in his pocket. Before doing so, Darcy said: "Where is the hero that hit me?" "Why doesn't someone take this gun off me?" "I feel like shooting someone else." Then he turned towards the doorway and said, "Where is the police, I feel like shooting some of them?" After Foster had removed the money out of the wallets and the cash register, he grabbed a bottle of whiskey from behind the bar, jumped over the bar and walked over to where Mr. Hellerman was lying on the floor, nudged him and said: "He is not dead yet." "He is still breathing." Thereupon Zietz went over and took Hellerman's hat and said: "You won't need this again." Darcy, in the meanwhile, was shooting at the telephone and after making several attempts to fire without success, he said: "My gun doesn't work." After Darcy tore the wiring off the telephone, he and his two companions walked towards the doorway, Zietz and Darcy going outside, while Foster stood at the doorway, waved his gun, and said: "I don't want you to move for some minutes." He went out and shortly reappeared and said: "I said not to move for a few minutes" and then, looking at the Christmas decorations, said, finally: "I wish you all a very Merry Christmas" and then disappeared.

In this robbery, Darcy and his two companions took $78.00 from the cash register, and $2.00 from Naysmith's pocket. In addition, there were a number of watches and a considerable sum of money, in the aggregate, taken from the patrons.

While this confusion of shooting and robbing was going on in the tavern, a Mrs. Leutwyler, a friend of Hellerman who was shot, escaped from the shuffle board room through a rear door and ran across the road to the Buck Hotel where she gave the alarm as to what was going on at the Feasterville Tavern. Arriving there, she found the bartender be-

hind the bar and two other persons in the room, William Kelly and Frank J. Walter. Kelly tried to prevent her from returning to the tavern but she eluded him and went back to the shuffle board room. Kelly and Walter followed her outside and stood at the intersection of the Churchville-Newtown and Bustleton Roads. While there, Horace Patterson, came driving out of the Churchville Road and, after making a part of a left turn, stopped to talk with Kelly and Walter, with whom he was acquainted. While standing there and talking to Patterson they noticed a 1939 Plymouth automobile with the grille crushed in and the left headlight out, with the engine running, standing in front of the Feasterville Tavern headed towards Newtown. They next saw two men running up along the porch from around the corner of the Feasterville Tavern and get into the car, one getting into the driver's seat and the other going around to the other side. Then, a third man came running out and got into the car. They tarried a moment, turned on the lights, turned them off again, and then started driving towards Newtown. As the car was entering the Newtown Road, about ten or twenty feet from where Walter and Kelly were standing, two shots were fired and Kelly fell. Patterson got out of his car and he and Walter called for assistance. They heard Kelly say: "Who were they?" "Why did they shoot me?" "Look, I am paralyzed." Later, Kelly became unconscious and was removed to the Abington Hospital where he was treated and died the following day, December 24, 1947, the cause of death, according to the attending physicians as well as the coroner's physician, being cerebral hemorrhage as the result of a head wound and fracture of the skull.

There were two shots fired, according to eye witnesses. It was later learned that the other shot passed through the window of a house known as the "Hogeland House" located directly across the street from the Feasterville Tavern,

the bullet having been found on the window base or sill. It was subsequently ascertained, by a ballistic expert who examined the guns found upon Darcy and his co-defendants, that these shots came from the gun of Harry Zietz. This would seem to be corroborated by Zietz's confession or admission which was later received into evidence, that it was he who fired the shots, as they were leaving the tavern.

During the course of the trial the commonwealth offered to introduce testimony to show that, after leaving the Feasterville Tavern, the defendant and his companions drove in an easterly direction on the Newtown Road and shortly thereafter, during the same night or early morning of December 23d, committed another robbery or hold up, at an inn known as "Deacon's Inn", located a few miles distant from the Feasterville Tavern, along the Lincoln Highway near South Langhorne. This testimony was offered to show a course of subsequent conduct of the defendant and his companions; their identity as being the same individuals who, a short time prior thereto, robbed the Feasterville Tavern; that they carried out this second hold up at "Deacon's Inn", in the same general manner as at the tavern, and that when apprehended, they were found to be in possession of the watches stolen at the Feasterville Tavern. We received this testimony, over the objections of defendant's counsel, as showing a course of conduct on the part of the defendant and his companions; that it might indicate not only a course of conduct but a well prepared plan or system; and that the facts of the occurrence might throw some light upon the character of the defendant and thereby inform the jury as to the type of person he was, to better enable it to fix the penalty in the event of a conviction of murder in the first degree.

The commonwealth also offered evidence, purporting to be voluntary statements or confessions made by the defendant and his companions to Bucks County Detective Russo in the presence of other officers, including Lieut. Hanlon and several state police detectives, in the office of the Philadelphia Police Detective Bureau for the Fourth District, relating to prior unconnected robberies, committed or attempted to be committed or attempted to be committed by them. We received these statements in evidence over the objections of the defendant's counsel for the same purpose and upon the theory that it was a declaration made by the defendant against his own interests. These confessions also include statements of facts as to the events that occurred at "Deacon's Inn" subsequent to the robbery of the Feasterville Tavern and the killing of William Kelly.

The admission of this testimony over his counsel's objections would appear to be the defendant's sole complaint, inasmuch as all of the assignments of error alleged in support of his motion for a new trial relate to the admission of certain testimony and the defendant's confessions of prior and subsequent unconnected crimes, alleged to have been committed by the defendant and his companions. It is the defendant's contention that under the Act of July 3, 1947, P. L. 1239, Sec. 1, which purports to amend the Act of March 15, 1911, P. L. 20 regulating in criminal trials the cross-examination of a defendant, when testifying in his own behalf, all evidence of independent crimes and of prior convictions or admission of unrelated criminal acts has been excluded and, therefore, the admission of this testimony over defendant's objections, was error.

Although the general rule is well established that, at common law, in the trial of a defendant for a particular crime, no other independent offenses committed by him,

unconnected with that laid in the indictment, are admissible to establish the fact of the commission of the crime for which he is being tried, there are, nevertheless, many well recognized exceptions where the commission of another offense by the defendant may be received in evidence, such as where there actually exists an evidentiary connection between the two crimes, so that proof of one tends to prove the other, in which case they are no longer independent and unrelated and it is competent to introduce evidence of the one in the trial of the other. Com. v. Coles, 265 Pa. 362, 367; Com. v. Weiss, 284 Pa. 105, 110; Com. v. Parker, 294 Pa. 144, 151.

In Com. v. Williams, 307 Pa. 134, Mr. Justice Kephart in discussing this proposition, says on page 148: "There are, however, many well recognized exceptions where the commission of another offense by the defendant may be received in evidence. Prior convictions can be admitted in evidence to show intent, scienter, motive, identity, plan, or the accused to be one of an organization banded together to commit crimes of the sort charged, or that such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the facts; also to prove the mental condition when the defense was insanity, or to rebut the inference of mistake, or to show a guilty knowledge: Com. v. Coles, supra; Com. v. Cicere, 282 Pa. 492; Com. v. Dorst, 285 Pa. 232; Com. v. Quaranta, 295 Pa. 264. For these purposes, prior convictions or criminal records may be brought out either on cross-examination or by extrinsic testimony: Goersen v. Com., supra; Com. v. Coles, supra; Com. v. Weiss, 284 Pa. 105; Com. v. Ferrigan, 44 Pa. 386; Wharton, Criminal Evidence (10th edition) section 31".

Therefore, independently of the Act of May 14, 1923, P. L. 759 as re-enacted by the Criminal Code of June 24, 1939, P. L. 872, Section 701, (18 P. S. 4701), which placed an added duty upon the jury, in the event it found the defendant guilty of murder in the first degree, and invested it with the heretofore exclusively judicial function of determining the punishment to be administered, evidence of prior independent unconnected offenses, as well as subsequent conduct of the defendant, was admissible where the court was satisfied that there existed an evidentiary connection between them and the crime for which the defendant was on trial.

Since the passage of the Act of 1925, our courts have generally regarded such evidence as admissible in order to enable the jury to properly exercise its enlarged functions. In Com. v. Parker, supra, Mr. Chief Justice Moschzisker, speaking for the court, after observing that the jury was entitled to the same sort of information that a judge considers when deciding as to the punishment for crime, says on page 154:

> "While, under the Act of 1925, the jury are supposed to determine the degree of defendant's guilt before assessing the punishment (Com. v. Curry, 287 Pa. 553, 558), yet the act requires both the question of guilt and punishment to be covered by one verdict. It may be that, if under any circumstances evidence of other offenses than the one on trial is admitted as helpful to the jury in the performance of its duty in assessing the punishment, such proof will inevitably be used by it in determining the guilt of the prisoner. This is not an insurmountable objection. Exactly the same point has been raised in cases arising under statutes as to habitual criminals, which require the jury to find the

fact of former convictions (see Wigmore on Evidence, volume 1, section 196, part 2); but, as said by the court in Hall v. Com., 106 Ky. 894, 898, 51 S. W. 814, 815, if the admission of such evidence is hard on the defendant, it is a burden which he must bear, there being 'no provision for a separate trial of the fact of former conviction.' Here the statute requires the jurors to assess the punishment, and permits them to extend mercy, in what appeals to them as a proper case, by reducing the penalty to life imprisonment; but there is no provision for a separate inquiry as to the fact of whether or not the defendant is entitled to such mercy, nor is there any evidence that the statute intended there should be such a separate inquiry. The Act of 1925 was not passed to help habitual criminals, and we take judicial knowledge of the fact that offenders of that designation have become so general that the law, not only lex scripta but non scripta, must advance to protect society against them. This being so, in a case like the present, where the trial judge was convinced from the confessions of the defendants, as the court below evidently was, that they were habitual offenders against society,—robbers, burglars, and, as occasion arose, murders,—where the evidence indicated such to be their general manner of life, and where the defendants asked that, if convicted, the jury, in assessing punishment, extend mercy to them, we cannot say it was reversible though it is possible that the admissions therein of other offenses may have militated in a general way against defendants. We may add, the mere fact that evidence legally admissible against one of several defendants may prejudice his codefendant, is no reason for its exclusion: Fife et al. v. Com., 29 Pa. 429, 437."

See also, Com. v. Weston, 297 Pa. 382; Com. v. Dague, 302 Pa. 13; Com. v. Harris, 314 Pa. 81; Com. v. Thompson, 321 Pa. 327; Com. v. Clark, 322 Pa. 321; and Com. v. Jones, 355 Pa. 594.

Reference to the testimony reveals that the defendant, Darcy, while the robbery of the patrons of the "Deacon Inn" was in progress, said to two of the men sitting at a table, "It's a stick-up", (N. T. 684) and again repeated, "This is a stick-up" . . . "We just got done shooting,—stop fooling around". Then he added, "We just shot a couple of fellows". It was further testified that Darcy said, "Out with the wallets and put them on the table,—no funny stuff. I just shot three guys in the last place." Again, upon cross-examination of one of the commonwealth's witnesses, Darcy was quoted as having said, "We just shot three guys at the last place". On the basis of further establishing the identity of the perpetrators of the first crime, we believe the evidence was admissible. Not only did it place the defendant in the general vicinity of the murder and indicate that he was familiar with the facts of the original hold-up but it was an admission of his complicity therein.

The admission of the evidence relating to the subsequent conduct of the defendant as well as the previous unconnected offenses also fell within that exception which permits evidence to show that this was an organization banded together to commit crimes of the sort charged. It was a part of the natural sequence of the testimony in developing the activities of the defendants from the time the original crime was committed until the defendants were apprehended, early in the following morning after the killing of Kelly. Mr. Justice Maxey in Com. v. Strantz, 328 Pa. 33, in discussing the admissibility of testimony of other crimes committed by

defendant and assailant, and by assailant alone, prior to the killing, not connected with the killing, says on page 44:

"In so far as they reveal a plan to rob and murder, as they clearly do, they *were* connected with the killing.

"In the famous case of People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286, the Court of Appeals of New York, in an opinion by Judge Werner, said: 'Generally speaking evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. . . . To bring a case within the exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general or composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both'. In a footnote in Wharton's Criminal Evidence, Vol. 1, (10th ed.), page 150, the author says: 'When system is once proven, every particular part of the system may be explained by the other parts, which go to make up the whole'. See also State v. Kernan, 65 Md. 253, 4 A. 124.

"The third 'question involved' relates to the admission of testimony of crimes committed by defendant and assailant and, by assailant alone *after* the killing. Such testimony is admissible on the principles of proof already discussed by us."

Our courts have repeatedly ruled that the Act of 1911, supra, extends only to the cross-examination of the accused, as the title and the body of the acts specifically applies to such examination and does not relate to affirmative proof by the commonwealth already admissible under the exceptions hereinbefore noted or to assist the jury in fixing the penalty in murder cases under the Act of 1925, as amended. Com. v. Williams, supra, 149. See also, Com. v. Dorst, 285 Pa. 232, 238; Com. v. Garanchonskie, 251 Pa. 247; Com. v. Bertman, 37 D & C 93. It will be noted that this rule limiting the act to cross-examination had been promulgated by our courts prior to the act of 1925, the effect of which we have already discussed. With this construction as to the limitation of the scope of the Act of 1911, we are confronted with the question as to the effect of the 1947 amendment thereto as to the admissibility in homicide cases of affirmative evidence of prior unconnected offenses or convictions of crime and of statements or confessions in which the accused admitted the actual commission of other crimes.

We disagree with the defendant's counsel that the language of the Act of 1947 is clear and unambiguous and that its meaning is plain and obvious that it was the intent of the legislature to exclude all evidence of prior convictions or evidence of unrelated criminal acts. On the contrary, a careful study of this act, with particular reference to the third exception would seem to make its effect, whether or not limited to cross-examination, to be so vague, indefinite, and uncertain that the most that can be expected of decisions based on it would be a mere guess as to the legislative intent in the adoption of this peculiar amendment. "Where a statute is 'so vague, indefinite, and uncertain that the courts are unable to determine, with any reasonable degree of

certainty, what the legislature intended, or it is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, it will be declared inoperative'." Miller v. Belmont, Packing and Rubber Co., 268 Pa. 51, 63; Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 595.

The title of the Act of 1947 is "AN ACT To amend section one of the act, approved the fifteenth day of March, one thousand nine hundred and eleven (pamphlet laws 20), entitled 'An act regulating in criminal trials the cross-examination of a defendant, when testifying in his own behalf,' by further providing what evidence is or is not admissible." Without quoting the act at length, it reads, inter alia: ". . . in the trial of any person charged with crime, no evidence shall be admitted which tends to show that the defendant has committed, or has been charged with, or has been convicted of any offense, other than the one wherewith he shall then be charged, or that he has been of bad character or reputation unless,—". To the rule thus promulgated, the act makes three exceptions, the third of which is the only one pertinent to the present inquiry and which is: unless,)—"Three. The proof that he has committed or has been convicted of such other offense is admissible evidence as to the guilt or the degree of the offense wherewith he is then charged."

In order to properly construe this act and the purpose of the legislature in passing it, we must read it in connection with its title which expressly states that it is an act to amend an act regulating, in criminal trials, the cross-examination of a defendant, when testifying in his own behalf by providing what evidence is or is not admissible. We have hereinabove noted that the Act of 1911 has been construed to apply only to cross-examination of the defendant and not to affirmative proof by the commonwealth and, fur-

ther, that the effect of the Act of 1925 was to make evidence of prior convictions and confessions or statements of the defendant admissible in aggravation of the penalty. If, as was strongly urged by the defendant's counsel at the argument, the legislature, in passing the Act of 1947, clearly intended to bar all affirmative proof by the commonwealth of independent crimes or convictions, other than the crime for which the defendant is on trial, then the Act of 1925, as re-enacted, supra, becomes ineffectual and, since we have no statute in Pennsylvania permitting piece-meal verdicts, our juries would be deprived of the evidence, so necessary, to properly fulfill their function of assessing the penalty. We do not believe that the legislature intended the Act of 1947 to destroy or nullify the Act of 1925. Neither do we believe that it intended to exclude evidence of subsequent conduct or of independent unconnected crimes. On the contrary, it is our opinion that it, specifically, intended to recognize the right of a jury, in a murder case, to hear extraneous evidence in order to determine both the guilt and the degree of the offense wherewith the defendant is charged, and that the only reasonable interpretation of this third exception is that the phrase "as to the guilt or the degree of the offense" simply means that the prosecution may still introduce proof of other crimes having an independent relevancy for the purpose of proving that the defendant is guilty of the crime with which he is charged. To construe it otherwise would make the act meaningless, because with this exception it is only a restatement of the law as it existed prior to its passage.

In Com. v. Robinson, 163 Pa. Super. Ct. 16, which is the only reported case we have been able to find, construing the Act of 1947, the Superior Court, speaking through Arnold, J., held that under the third exception in the act where the evidence which tends to show a prior offense is independ-

ently relevant (as on identification of the culprit) it is admissible as to the guilt of the defendant of the offense charged and that the old rules of relevancy and admissibility are unaffected. See also "Evidence of Defendant's Character in Pennsylvania Criminal Cases" by Robert F. Banks, 96 University of Pennsylvania Law Review, 853, and "Prior Convictions of a Defendant as Evidence in a Criminal Trial" by Lindley R. McClelland, 22 Temple Law Quarterly, 220.

It was strongly argued by the commonwealth that if the Act of 1947 was intended to limit the introduction of all affirmative evidence of independent crimes, whether or not it be under cross-examination, then by its provisions, it is clearly unconstitutional. This contention has considerable merit. In examining any statute to determine its constitutionality, we must determine whether its purpose is clearly set forth in its title and, in addition, if it has any effect, whether that effect is limited by the title. In 59 Corpus Juris, page 811, paragraph 393, the text writer stated the proposition as follows: "Since a constitutional requirement that the subject of a statute be expressed in its title is generally regarded as mandatory, the title is an essential part of an act, and the subject expressed in the title fixes the limit of the valid scope of the act. The provisions of an act must correspond with the subject expressed in its title; so nothing can validly be included in the body of the statute which is not expressed in or covered by the title, and all parts of an act which are not within its title are unconstitutional and void, even though such provisions might properly have been included in the act under a broader title". This is such a fundamental rule that we deem it unnecessary to enter into a prolonged discussion.

We are fully aware that the title need not be an index or synopsis of the statute, nevertheless, it must not mis-

lead, and the test to be applied to determine its sufficiency is the inquiry whether it fairly gives notice, by its terms, to all persons interested, of the subject matter of the act. See Payne et al. v. School District, 168 Pa. 386, 391: Poor District (No. 1), 329 Pa. 390. The title of the Act of 1947 as we read it, admits of only one construction, that its application is restricted to cross-examination of a defendant when he testifies in his own behalf and if it is to have any effect whatever on the statute books it must be so construed. If it was intended that it be given a wider construction so as to exclude all evidence of prior offenses and convictions or admissions of unrelated criminal acts, regardless as to whether by affirmative testimony or by cross-examination, then, in that event, we would be inclined to hold the act to be unconstitutional.

A careful review of the record of this case convinces us that the defendant was fully protected in the admission of the testimony, as well as to the effect to be given thereto. In our charge to the jury we specifically instructed the jurors that the defendant's confessions, with respect to prior crimes in which he was involved were admitted for only one purpose, as was the testimony of his conduct at "Deacon's Inn" subsequent to the killing of Kelly at Feasterville, namely: to provide them with information which might throw light upon the character of the defendant, so that they might know, in the event of a conviction of murder in the first degree, the type of man the defendant, David Darcy, was, and to better enable them to fix the punishment for the offense. We further instructed them with reference to the defendant's confessions, which included statements as to prior crimes, as follows: "these references to these independent crimes must not be considered by you as proof of the commission of the offense alleged to have occurred at

the Feasterville Tavern". Clearly, under the decisions hereinbefore cited and discussed, this was more than the defendant was entitled to under the law, and he has no reason to complain.

It is our conclusion that the defendant not only had a fair and impartial trial but that the verdict of guilty of murder in the first degree with the penalty of death was fully warranted under the evidence and the law, and we find no error in the proceedings to warrant the granting of a new trial. Accordingly, the assignments of error must be overruled and a new trial refused. The court will enter the following order:

ORDER

And Now, February 16, 1949, the defendant's assignments of error and reasons in support of his motion for a new trial are overruled, a new trial is refused and the defendant is directed to appear before this court for sentence.

By THE COURT,

/s/ Hiram H. Keller,
P. J.

Petition for Writ of Habeas Corpus and Rule to Show Cause.

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 257 H. C.

UNITED STATES OF AMERICA,
ex rel. DAVID DARCY,

Relator,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. JOHN W. CLAUDY, Warden of Western State Penitentiary,

and

CARL H. FLECKENSTINE, United States Marshall for The Middle District of Pennsylvania,

Respondents.

To the Honorable, the Judges of the United States District Court for the Middle District of Pennsylvania:

The petition of David Darcy respectfully represents:

1. That the relator was indicted for the murder of William Kelly in the Court of Oyer and Terminer of Bucks County, to No. 37, February Term, 1949, and upon entering a plea of not guilty was tried before the Honorable Hiram H. Keller and a jury, wherein the jury returned a verdict of guilty of murder in the first degree and fixed the penalty at death.

2. At such trial, the relator was not permitted by his counsel to take the witness stand in his own defense nor did his counsel produce any witnesses as to the background, or personal history, or mental condition, or previous good behavior, or character, or reputation of the relator. All of which evidence was readily available, favorable to the relator and would have had great influence with the jury in their determination of the guilt and punishment of the relator.

3. That the Court of Oyer and Terminer of Bucks County denied the relator a new trial and affirmed the conviction and judgment of sentence.

4. That upon appeal to the Supreme Court of Pennsylvania, such conviction and judgment of sentence were affirmed in an opinion by the late Chief Justice Maxey, reported in Commonwealth vs. Darcy, 362 Pa. State Reports, 259, to which Justice Jones dissented.

The majority opinion contained the statement that "he (Darcy) did not testify and no evidence was given in his behalf."

5. That a petition was presented in behalf of the relator to the Supreme Court of the United States for a certiorari, which was denied without opinion.

6. That an application was made by the relator to the Board of Pardons for clemency, which was finally refused on March 21, 1951, and the request for a rehearing denied on March 31, 1951.

7. That the Governor of Pennsylvania, by executive order, directed that the relator be removed from the Bucks County Prison to the Western State Penitentiary at Rockview, Center County, Pennsylvania, to carry out the sentence of death during the week beginning April 2, 1951,

and later by special order of April 1, 1951, directed the warden of the Western State Penitentiary not to proceed with the execution of such judgment of sentence until April 4, 1951, so that a petition for a rule for reargument could be presented on April 2, 1951, to the Supreme Court of Pennsylvania on behalf of the relator.

8. That such petition was filed on April 2, 1951, with the Prothonotary of the Supreme Court of Pennsylvania, which was entered to No. 429, Miscellaneous Docket, No. 9, and the Supreme Court refused on April 3, 1951, to grant the prayer of such petition and issue the rule as requested.

9. That the relator is still confined in the Western State Penitentiary for the purpose of carrying out such sentence of death and under the special executive order of the Governor of April 1, 1951, will go to his death at 0001 a.m. on Wednesday, April 4, 1951.

10. That the relator is so restrained and confined under sentence of death unlawfully imposed in violation of the guarantees of a fair and impartial trial afforded by the Constitution and contrary to the due process clause and the Fourteenth Amendment to the United States Constitution.

11. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution, for the reason among others:

That the relator was placed on trial at Doylestown on June 7, 1948, the week following the trial of the co-defendants, Harry Zeitz and Harold Foster, who were found guilty on June 4, 1948 of murder in the first degree and the penalty fixed at death. Zeitz was the one who actually fired the shot which killed William Kelly.

That upon the conviction by the jury of Zeitz and Foster, Judge Calvin S. Boyer, who presided at such trial, openly and publicly praised the jury for their verdict and the local newspaper, the "Doylestown Daily Intelligencer", carried on its first page an article which stated that:

> "Judge Boyer praises the jury for verdict condemning two killers to electric chair. Court tells eight men and four women he could not see how any other course could have been taken—two defendants appear to be unmoved", and included therein an actual quotation attributed to Judge Boyer, which is as follows:
>
> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision."

That the hysteria and prejudice, which swept the town, as the result of the Zeitz and Foster trial and verdict, was so general as to influence beyond a slight degree those jurors included in the panel from whom the jurors who actually tried the relator upon the charge of murder were selected.

That nevertheless instead of postponing the relator's trial in the interest of a fair and impartial trial, until a later date when the relator could have been tried in an atmosphere of judicial calmness unaffected and uninfluenced by the developments in and the reactions of the immediately preceding trial of the relator's co-defendants, the relator was forced to go to trial on Monday, June 7, 1948, before Judge Hiram H. Keller and jurors, who had been drawn from a second panel and were familiar with

what had transpired during the prior week in the Zeitz and Foster trial and the relator's connection therewith and the judge's utterances and the public and newspaper comments thereon.

That during the course of the relator's trial, Judge Boyer, who had presided at the Zeitz and Foster trial and had publicly congratulated and commended the jurors on their verdict in that case, appeared at different times in the court room, where he could be plainly seen and observed by the jury trying the relator, and at times sat upon the bench and assisted and conferred with Judge Keller in the conduct of the trial of the relator and at other times elsewhere in the court room, but at all times the presence of Judge Boyer reminded the jurors serving in the relator's trial of the trial of Zeitz and Foster and the expressed commendatious attitude of Judge Boyer toward that verdict.

That during the course of the trial of the relator, Judge Boyer on June 12, 1948, in sentencing to prison a young man from Philadelphia by the name of Robert White, age 18 years, who had pleaded guilty to stealing a car radio out of an automobile said:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched. What business did you have to come up here in the first place? So far as your testimony is concerned, you have not shown any excuse here at all to come out of Philadelphia to Bucks County",

and such statement appeared as an actual quotation from Judge Boyer in the issue of the "Doylestown Daily Intelligencer" of June 12, 1948.

Judge Boyer had been on the Bucks County bench for a number of years, was well respected throughout the

county, and his statements and actions would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial.

12. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution for the reason among others:

That the relator was not permitted by his counsel to take the witness stand in his own defense and neither did his counsel produce any witnesses as to the background, personal history, mental condition, prior good behavior, character and reputation of the relator.

That it was the duty of counsel for the relator to prepare the case of the relator and to make or caused to be made such investigations as may be necessary and thereupon to introduce all evidence and testimony, which would be helpful to the jury in determining the guilt or innocence of the relator and in fixing the punishment under the law.

That recently many reputable citizens have written letters, which are attached and collectively referred to as Exhibit A, indicating their opinion as to the good reputation of the relator prior to becoming involved with the three other co-defendants. [These were letters to the Pennsylvania Board of Pardons and are not reprinted as an exhibit]

That when such letters, as well as other information, were shown to the jurors, who tried the relator and found him guilty of murder in the first degree with the death penalty, six of such jurors clearly indicated in letters that, had the relator taken the witness stand in his own defense or had his counsel produced evidence of good reputation, they would have fixed the penalty at life imprisonment instead of death.

That excerpts from the letters of such jurors, which are attached and referred to collectively as Exhibit B, are as follows:

(a) Letter of Ruth G. Bliss: "If I personally had the information about his reputation and character prior to this trial, which I have since become acquainted with, I would have voted for life imprisonment rather than the extreme penalty."

(b) Letter of Jesse H. Horne: "Had his life's record been revealed to me, I would have voted for life imprisonment."

(c) Letter of Ann L. Reed: "If I had heard the defendant's side of the story, I would have voted for life imprisonment."

(d) Letter of L. Calvin Fluck: "If I had had this information at the time of the trial, and could have had it revealed to me that his reputation prior to the time he became involved in his short career of crime, I would have voted for life imprisonment instead of the death penalty."

(e) Letter of Howard Price: "Had I known more about the defendant's background, I would have voted for life imprisonment."

(f) Letter of Anna W. Bucher: "My vote would have been for life imprisonment had I had any such knowledge of his good reputation prior to this trouble."

That other of the jurors indicated in their letters, which are attached and referred to collectively as Exhibit C, as follows:

"There was only one conclusion we could come to when no defense was made and no character witnesses offered in that his character was so bad that it would not have helped in his case and that the lawyer who was fighting for his life would not have overlooked anything so important if there was anything to offer in the way of character and character witnesses." They also indicated that "having read letters from prominent people in the community," they

believed "that the counsel for the defense erred, in not having character witnesses testifying in his behalf, and thereby did an injustice to David Darcy."

That counsel for the relator was not diligent in failing to introduce those witnesses, who would have testified as to the prior good reputation of the relator.

That since the trial of the relator, examinations have been made of the relator by Dr. A. Ornsteen, and Dr. Carl J. Hoffman, both of Philadelphia, and each has submitted a report thereof, which are attached and referred to collectively as Exhibit D. Dr. Ornsteen is a qualified, outstanding and well known psychiatrist, who states in his report that:

> The relator is "a psychopathic personality type of individual; showing indications of being very easily swayed and persuaded to go along and act impulsively and without consideration of possible serious result to himself and others; that the numerous physical ailments in his early life topped by a year of bed and house confinement for a heart malady laid the groundwork for an inferiority feeling reaction which later required a superiority reaction compensation. This was very likely a strong part of the emotional drive which motivated his participation in crime."

That from the history of the relator's case as disclosed by the reports of Dr. Ornsteen and Dr. Hoffman, it appears that the relator had suffered head injuries and had become despondent because he was rejected by the Navy and later classified as 4F. It was the reasonable duty and obligation of counsel for the relator to have these and other essential facts investigated by a psychiatrist and if the results of such examination warranted it, then it was the further duty and obligation of counsel for the relator to have the psychiatrist to testify as to the results thereof

before the court and jury, which testimony would have been helpful to the jury in passing upon the guilt or innocence of the relator and in fixing the penalty at death or life imprisonment. Counsel for the relator neglected to have the relator examined by a psychiatrist, and if the relator had been so examined, the psychiatrist would have testified, as Dr. Ornsteen reported, that the relator was easily led and a psychopathic personality.

13. That these facts, if the relator and other witnesses had been called to the witness stand by counsel for the relator, would have gone to and had a direct bearing upon the issue before the jury not only in determining the guilt or innocence but also in fixing the penalty.

14. That the relator is entitled to have a fair and impartial trial and also to have submitted to the jury all the facts and all the circumstances. The failure of counsel for the relator to present a defense in the behalf of the relator or to call character or other witnesses for him "offends against the fundamentals of a fair and impartial trial", according to the Supreme Court of Pennsylvania in the case of the Commonwealth v. O'Brien, reported in 312 Pa. State Reports, 543, (546).

15. That Earl D. Handy is the warden of the Bucks County Prison at Doylestown, Pennsylvania; Dr. John W. Claudy, the warden of the Western State Penitentiary at Rockview, Center County, Pennsylvania; and Carl H. Fleckenstine, the United States Marshall for the Middle District of Pennsylvania.

16. That the relator because of his present confinement to the Western State Penitentiary is unable to execute personally this petition and consequently the same has been executed by his counsel.

Wherefore, the relator contending that, under the allegations hereof, he is about to be put to death in viola-

tion of due process of law and the Fourteenth Amendment to the Constitution of the United States, prays:

(1) That a writ of habeas corpus be granted and awarded for the release of the relator from confinement pursuant to the judgment of death sentence, directed to Earl D. Handy, Warden of the Bucks County Prison, and Dr. John W. Claudy, Warden of the Western State Penitentiary, demanding them to have the body of the relator before your Honorable Court immediately, to do, submit to and receive what your Honorable Court may consider right, and likewise directing the said Earl D. Handy and Dr. John W. Claudy to make return certifying specifically and fully the true cause of commitment and detainer;

and

(2) That an order staying the execution of the death penalty upon the relator and other proceedings thereunder be granted and awarded, until your Honorable Court shall have acted upon and finally disposed of this petition.

And he will ever pray.

DAVID DARCY,
Relator,

By: /s/ CHARLES J. MARGIOTTI,
Charles Margiotti,

/s/ MORTON WITKIN,
Morton Witkin,

/s/ J. DRESS PANNELL,
J. Dress Pannell,
Attorneys for relator, David Darcy.

State of Pennsylvania,
County of Philadelphia. } ss.:

On this 3rd day of April, 1951, before me the subscriber, a Notary Public in and for the said County and State, personally appeared Morton Witkin and J. Dress Pannell, who being severally duly sworn according to law, each depose and say: that the facts set forth in the foregoing petition are true and correct so far as the same are based upon personal knowledge; and so far as the same is based upon information and belief, they believe them to be true and correct.

/s/ MORTON WITKIN,
Morton Witkin,

/s/ J. DRESS PANNELL,
J. Dress Pannell.

Sworn to and subscribed before me, the day and year first aforesaid.

/s/ MARION R. FORD,
Notary Public.
My Commission Expires Feb. 1st, 1953.

(SEAL)

Certified from the record.

Date April 3, 1951

T. H. Campion, Clerk
Per /s/ R. P. Bowen
Deputy Clerk

(SEAL)

EXHIBIT B.

485 Main Street
Doylestown, Pa.
March 26, 1951

To Whom It May Concern:

I served as a juror at the trial of David Darcy who was convicted of murder in the first degree and sentenced to death.

If some defense or character witnesses had been offered at this trial, I feel there would have been a change in the verdict arrived at. If I personally had the information about his reputation and character prior to this trial, which I have since become acquainted with, I would have voted for life imprisonment rather than the extreme penalty.

Yours truly,

RUTH G. BLISS,
/s/ Ruth G. Bliss.

EXHIBIT B.

Quakertown, R. D. #3, Pa.
March 24, 1951

To Whom It May Concern:

I served as a juror at the trial of David Darcy, who was convicted of murder in the first degree and sentenced to death.

During the trial it was quite noticeable that no defense was made which might have altered the verdict which has been rendered. The question of character witnesses was raised by the jurors and, in view of none having been called to testify in the defendant's behalf, it was quite obvious

that no other verdict could be rendered. The fact there were no character witnesses led us to the belief that his character was such that no one could testify in his behalf. Had his life's record been revealed to me, I would have voted for life imprisonment.

Yours very truly,

/s/ JESSE H. HORNE,
JESSE H. HORNE.

EXHIBIT B.

Penns Park, Pa.
March 24, 1951

To whom it may concern:

I served as a juror on the case of David Darcy, who was convicted of murder in the first degree and sentenced to death.

Usually there are two sides to every story and I thought it was most unusual that no defense was offered nor were any character witnesses presented to say a word in the defendant's behalf. I concluded, as did the other jurors as this matter was discussed, that his character was such that those who knew him intimately could not testify to his good character prior to this time. If I had heard the defendant's side of the story, I would have voted for life imprisonment.

Very truly yours,

/s/ ANN L. REED,
ANN L. REED.

EXHIBIT B.

38 Penrose Street
Quakertown, Pa.
March 27, 1951

To whom it may concern:

I served as a juror at the trial of David Darcy who was convicted of murder in the first degree and sentenced to death.

I had only the testimony of the prosecuting attorney and his witnesses to be guided by in making my decision. I, and all the other jurors could not understand why there were no character witnesses to testify as to the reputation of the defendant, nor was any defense presented. We had only one conclusion to reach that the defendant's reputation was such that no one could say anything good for him.

If I had had this information at the time of the trial, and could have had it revealed to me that his reputation prior to the time he became involved in his short career of crime, I would have voted for life imprisonment instead of the death penalty.

Yours very truly,

/s/ L. Calvin Fluck
L. CALVIN FLUCK

EXHIBIT B.

Doylestown R. D. #2, Pa.
March 24, 1951

To whom it may concern:

I served as juror at the trial of David Darcy who was convicted of first degree murder and sentenced to death.

I, as the other jurors, could not understand why no defense was offered in this case nor were any character witnesses called to testify in the defendant's behalf. We had nothing to go by other than the testimony we heard at the trial. Perhaps if there had been a defense offered, the verdict may have been different.

The appearance of the defendant at the time of the trial was neat and he appeared clean-cut to us and he also maintained himself in a quiet, mannerly way which impressed us. Had I known more about the defendant's background, I would have voted for life imprisonment.

Yours very truly,

/s/ HOWARD PRICE
HOWARD PRICE

EXHIBIT B.

Newtown R. D. #2, Pa.
March 26, 1951

To whom it may concern:

I served as a juror at the trial of David Darcy who was convicted of murder in the first degree and sentenced to death.

Had we had the information as to his reputation and character, which I have since had the opportunity of reviewing, I feel confident the verdict would have been for life imprisonment, instead of the extreme penalty. I felt it most unusual that no defense nor character witnesses were offered. My vote would have been for life imprisonment had I had any such knowledge of his good reputation prior to this trouble.

I feel that the lack of defense and the presentation of such information as to his character was a serious oversight, and I certainly would like to have this boy given reconsideration because of it.

Yours very truly,

ANNA W. BUCHER
/s/ Anna W. Bucher

EXHIBIT C.

Perkasie R. D. #2, Pa.
March 24, 1951

To whom it may concern:

I served as a juror on the case of David Darcy and the question was raised by the jurors as to his character. There was only one conclusion we could come to, when no defense was made and no character witnesses offered—that his character was so bad that it would not have helped at all in his case, and that the lawyer who was fighting for his life would not have overlooked anything so important if there was anything to offer in the way of character and character witnesses.

Yours very truly

/s/ Oliver C. Landis
OLIVER C. LANDIS

P.S. After having read the letters from prominent people in the community, I am led to believe that the counsel for the defence erred, in not having character witnenesses testifying in his behalf, and thereby did an injustice to David Darcy.

/s/ Oliver C. Landis

EXHIBIT C.

21 Hamilton Street
Telford, Pa.
March 24, 1951

To whom it may concern:

I served as a juror at the trial of David Darcy who was convicted of murder in the first degree and sentenced to death.

I was surprised at the abrupt ending of the trial for I fully expected character witnesses in behalf of the defense. When none were called to testify, I was led to believe that the defendant's character was of such a nature that nothing good could be said about him. Had there been character witnesses offered, there may have been a different verdict.

Since the jury was deprived of any knowledge of his former character, and no defense was offered, I could come to no other conclusion than the verdict decided.

Yours very truly,

/s/ MARVIN D. WEIDNER
MARVIN D. WEIDNER

P. S. Having read the copies of letters written in Behalf of David Darcy, I feel that he suffered an injustice by not having the defense offer character witnesses to testify in his behalf.

/s/ MARVIN D. WEIDNER

EXHIBIT C.

Perkasie, Pa.
March 26, 1951

To whom it may concern:

I was on the jury in the case of David Darcy. With the evidence we heard by the Prosecuting Attorney and his witnesses, we found him guilty.

There were no witnesses for Darcy, as to his character, reputation, or home environment. Everyone has some good qualities. Why he did not take the stand himself has wondered me.

I feel the jury should have heard from him or some witnesses for him.

Signed: FRANKLIN FRETZ

EXHIBIT C.

Perkasie, RD #2 Pa.
March 24, 1951.

To whom it may concern:

This is to state that I served as a juror in the trial of David Darcy. He was convicted of first degree murder and was sentenced to death.

At this trial it was noticable that no defense was made, a plea for imprisonment rather than the death sentence was made by the defense lawyer. No character witnesses were called.

Whether or not this lack of defense would have changed the verdict is open to question.

Yours truly,

/s/ ROGER MASON
ROGER MASON

EXHIBIT D.

DR. A. M. ORNSTEEN
2007 Delancey Place
Philadelphia 3, Pa.

PSYCHIATRIC REPORT ON DAVID K. DARCY, BORN APRIL 13, 1925.

On August 4th, 1950 I interviewed and made a psychiatric examination of David K. Darcy at the Bucks County Prison, Doylestown. A detailed interrogation and critical inquiry were made of his life's medical and experimental history. At present he is physically in good health but the history reveals that he had quite a number of illnesses, some of serious moment and at or about the age of eight he was confined to bed for almost a year for a cardiac condition. Chronic discharging ears kept him out of military service. His psychological reactions to these early life's situations and later social experiences created personality reactions which have had great influence on his future behavior.

Darcy was cooperative, frankly responsive and not at all reticent. His regrets and expressions of remorse seem genuine enough but there is a very striking disparity between his expressed feelings and the basic affect which is characteristic of the psychopathic personality. He has average intelligence but emotional immaturity, puerile attitudes and shallow abstract thinking constitute a defect of his basic esthetic and ethical feelings, a defect which is ingrained. This is borne of failure of satisfactory emotional adjustment in early life which set the patterns and fixed the dies for the psychopathic thwarting of his personality development. It appears that resentment grew into hostility, that sibling rivalry caused attitudes ridden

with envy and paranoid coloring. These constituted the basis for his antisocial reactions as indicated by an uncooperative and antagonistic type of behavior recognizable throughout the profile of his character formation. Lack of ethical appreciation of other people's feelings may be said, figuratively, to be due to a mental blind spot, a veritable semantical disorder of thinking which is a diagnostic criterion for the recognition of the psychopathic personality type of individual and this is my appraisal of David Darcy. He showed indication of being easily swayed and persuaded to go along and act impulsively and without consideration of possible serious results to himself and others. His numerous physical ailments in early life topped by a year of bed and house confinement for a heart malady, at a time when his desire for athletic activities and expression of his prowess was strong, undoubtedly laid the groundwork for an inferiority feeling reaction which later required a superiority reaction compensation. This was very likely a strong part of the emotional drive which motivated his participation in crime.

(signed) A. M. ORNSTEEN,
A. M. ORNSTEEN, M. D.

EXHIBIT D.

May 17, 1950

Governor James H. Duff
The Capitol
Harrisburg, Pennsylvania

Your Excellency:

This letter is written in behalf of David K. Darcy whose death sentence is to be considered by the Pardon Board of Pennsylvania this week. I have been drawn into this young

man's case through a friendship with his family, and have come to feel as if David's cause is my own. Writing this letter to you may accomplish nothing more than to relieve me of the burden of wanting to help in this grave situation, nevertheless, I want to submit my medical opinion for your consideration.

Because of the difficulty which the Darcy family experienced in gathering actual medical records belonging to David from several hospitals in Philadelphia, I was requested to review the hospital charts, and state that I had examined the available records pertaining to the illnesses of David K. Darcy. In so doing, I became quite interested in the boy and questioned his parents, brothers and sisters as to his whole life pattern. I then pursued the case to the extent of securing a brief personal interview with David at the Bucks County Prison. On the basis of information obtained from these various sources, I am convinced that there is a very definite possibility of a personality disturbance existing on the basis of a post traumatic syndrome.

There is a history of two head injuries—one at the age of ten, when he fell in the bathtub and struck his head on the faucet; another at the age of twenty when he was playing football and rammed his head into a goal post while traveling at a very high rate of speed. There is also a history of headaches, periods of irritability and restlessness. The headaches are apt to become severe at times of excitement. These attacks would necessitate discontinuing activity of any type.

This sort of history frequently is associated with definite brain damage, but unfortunately is not easily proven except by microscopic examination. Doctor N. W. Winkelman, Professor of Neuropathology, University of Penn-

sylvania, has demonstrated, by use of slide sections of the brain, that damage does take place in the cerebral cortex following head injury. Occasionally, such areas can be shown by electroencephalogram or by pneumoencephalogram. A negative report, however, does not rule out such an area of damage. Sometimes, these areas are not large enough to give positive neurological signs, but are only evidenced by disturbances in the habits and personality of an individual.

The head injuries referred to may seem minor and very frequently are overlooked when they occur. However, Grinker and Bucy, "Textbook of Neurology," 1949, point out the following:

> "Practically all investigators have found that there is little correlation between the severity of the injury and the development or the severity of the post traumatic symptoms."

I am unable to say exactly what bearing this syndrome would have on David's actions at the time of the Feasterville incident, but certainly feel that it might have played a definite role in the form of faulty judgment which resulted in the particular behavior pattern. However, I am forced to admit that according to legal standards, he is sane.

As a final note, I would like to qualify my evaluation of David Darcy by mentioning the fact that I have had considerable experience with men who have found themselves in the same predicament as David. While I was in the Army, I was assigned to Green Haven State Penitentiary, and came to know the prisoners intimately. I have since worked in conjunction with the Federal Parole Officer in Philadelphia, served time as a member of an Army Clem-

ency Board, evaluating and following up many hundreds of cases. With this experience as background for my opinion, I can honestly say that we are not dealing with a "criminal type" personality in David K. Darcy, despite the personality disorder which has been exhibited. This boy's type of personality is certainly good material for rehabilitation

Yours sincerely,

/s/ CARL J. HOFFMAN,
CARL J. HOFFMAN, M. D.

jd

Answer of John W. Claudy, Warden of Western State Penitentiary to Petition for Writ of Habeas Corpus.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA *ex rel.*
DAVID DARCY,
RELATOR,

v.

EARL D. HANDY, Warden of Bucks County Prison,
DR. JOHN W. CLAUDY, Warden of Western State Penitentiary

and

CARL H. FLECKENSTINE, United States Marshall for the Middle District of Pennsylvania,
RESPONDENTS.

No. 257
Habeas Corpus

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

AND NOW, to wit, this 16th day of April, 1951, comes John W. Claudy, Warden of Western State Penitentiary, by Robert E. Woodside, Attorney General of Pennsylvania, and answering said petition, *nunc pro tunc,* as of April 3, 1951, says:

1. Admitted.

2. It is admitted that the relator did not testify or introduce any evidence in his defense on the trial of the indictment. It is denied that his counsel, an able, skilful and competent trial lawyer would, or did, coerce, or intimidate, or prevent the relator from testifying or introducing any evidence in his behalf. On the contrary, it is averred that the trial strategy was not due to any lack of diligence or professional competency on the part of his counsel, but rather to a careful and well considered plan arrived at only after collaboration with other very able and competent trial counsel. It is further averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. *Deggs v. Welch,* (U. S. C. A., D. C., 1945), 148 F. 2d 667; *Morton v. Welch,* (C. C. A. 4, 1947), 162 F. 2d 840, 841; *Burkett v. Mayo,* (C. C. A. 5, 1949), 173 F. 2d 574; *Andrew v. Robertson,* (C. C. A. 5, 1944), 145 F. 2d 101, 102; *Jones v. Dowd,* (C. C. A. 7, 1942), 128 F. 2d 331, 332; *United States ex rel. Feeley v. Ragen,* (C. C. A. 7, 1948), 166 F. 2d 976, 980-981; *United States ex rel. Weber v. Ragen,* (C. C. A. 7, 1949), 176 F. 2d 579, 586; *Sweet v. Howard,* (C. C. A. 7, 1946), 155 F. 2d 715; *Miller v. Hudspeth,* (C. C. A. 10, 1949), 176 F. 2d 111, 119-120; *Farrell v. Lanagan,* (C. C. A. 1, 1948), 166 F. 2d 845, 847; *Tompsett v. State of Ohio,* (C. C. A. 6, 1944), 146 F. 2d 95, 98; *Hudspeth v. McDonald,* (C. C. A. 10, 1941), 120 F. 2d 962, 968; *Helms v. Humphrey,* (D. C., Minn., 1945), 63 F. Supp. 4; *Ex parte Smith,* (D. C. N. D., Pa. 1947), 72 F. Supp. 935, 940.

3. Admitted.

4. Admitted.

5. Admitted. See 338 U. S. 862.

6. Admitted. It is averred that said application for executive clemency, by necessity, admitted the validity of

the judgment, now, for the first time, in this proceeding, claimed to be void for the reason specified notwithstanding that it was challenged in a habeas corpus proceeding in the Supreme Court of Pennsylvania, on other grounds and the Supreme Court of the United States denied certiorari to review the judgment of the Supreme Court of Pennsylvania denying a writ of habeas corpus (See 338 U. S. 862).

8. Admitted. It is averred, however, that said Petition for Reargument set forth substantially the same grounds alleged in this proceeding; that, had the Supreme Court of Pennsylvania been of opinion that there was any merit to the contentions, it, unquestionably, would have exercised its power, under the Acts of May 22, 1722 (1 Sm. Laws 140), and June 16, 1836, P. L. 785, "to minister justice to all persons" (See *Commonwealth v. Ragone*, 317 Pa. 113, 126-128, 176 Atl. 454 (1935)) and treated it as a petition for a writ of habeas corpus; that, since the Supreme Court of Pennsylvania refused the petition, the only deducible inference is that it felt that there was no merit to it.

9. Admitted. It is further averred that on April 3, 1951, execution of the sentence was stayed pursuant to the order of your Honorable Court, pending the determination of this proceeding; that on April 11, 1951, your Honorable Court dismissed the petition and refused a further stay of execution; that on the same day, to wit, April 11, 1951, the United States Court of Appeals for the Third Circuit granted the relator leave to appeal from the order of your Honorable Court dismissing the petition, and issued a stay of execution pending disposition of said appeal.

10. Denied. On the contrary it is averred that the relator was not denied due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States in the proceeding eventuating in the judgment and sentence of death.

11. It is denied that the relator was denied a fair and impartial trial in contravention of the Fourteenth Amendment of the Constitution of the United States.

It is admitted that the relator was placed on trial following the conviction of his codefendants of murder in the first degree, with the penalty fixed at death.

The respondent has no knowledge of the truth or falsity of the allegation with respect to the alleged remarks of Judge Calvin S. Boyer to the jury which tried the relator's codefendants following the rendition of its verdict and the alleged publication thereof in the "Doylestown Daily Intelligencer" and, therefore, neither admits nor denies the same, but, if material and relevant, demands proof thereof at the trial. It is averred, however, that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding, since it could and should have been raised in the appeal from the conviction or, at the very least, in the prior application for a writ of habeas corpus.

It is denied that as a result of the verdict in the trial of relator's codefendants hysteria and prejudice was so general as to influence the jurors included in the panel from which the jury who tried the relator on the indictment in the Court of Oyer and Terminer of Bucks County at No. 37 February Term, 1949, from rendering a verdict other than on the evidence and the law. On the contrary, it is averred, that the *voir dire* examination of the jurors who were selected to try the relator on said indictment which this court not only has a right, but also a duty to examine *(Dorsey v. Gill,* (U. S. C. A., D. C., 1945), 148 F. 2d 857, 870), clearly indicates that they, the jurors, selected were not prejudiced or influenced by the trial of the relator's codefendants, or by any matter connected therewith, and could reach a verdict solely on the basis of the evidence and the law applica-

ble thereto. It is further averred that the relator, who was represented at his trial by an able, skilful and competent trial lawyer (See the Charge of the Trial Court and the Opinion of the Supreme Court of Pennsylvania. *Commonwealth ex rel. Darcy v. Claudy* (Exhibit A)), made no application either to the trial court or the Supreme Court of Pennsylvania for a change of venue. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. Cf. *Wallace v. United States,* (C. C. A. 8, 1949), 174 F. 2d 112; *Bard v. Chilton,* (C. C. A. 6, 1927); 20 F. 2d 906; *United States ex rel. Buckhalter v. Lowenthal,* (C. C. A. 2, 1940), 108 F. 2d 863; *United States ex rel. Bongiorno v. Ragen,* (C. C. A. 7, 1945), 146 F. 2d 349, 352.

It is admitted that the relator's trial was not postponed. It is averred, however, that no application for a postponement was made to the trial court, and that there was no reason whatever, as indicated by the *voir dire* examination of the jurors selected to try the relator, why the trial court should have made such an order *sua sponte.* It is denied that the jurors who were selected to try the relator were familiar with the trial of the relator's codefendants, the court's alleged utterances to that jury, or the alleged newspaper comments thereon. It is averred that the *voir dire* examination of the jurors *conclusively* rebut the said allegation. It is further averred that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

It is admitted that Judge Calvin S. Boyer, who presided at the trial of the relator's codefendants, on one occasion, sat on the bench with President Judge Keller, who was presiding at the trial of the relator. It is averred, however, that said allegation is immaterial, irrelevant and not open to inquiry in this proceeding since it was a matter of

record and not only could, but also should have been presented, if it were felt that it constituted error, in the appeal, from the conviction, to the Supreme Court. *Sanderlin v. Smyth*, (C. C. A. 4, 1943), 138 F. 2d 729; *United States ex rel. Jackson et al. v. Brady*, (C. C. A. 4, 1943), 133 F. 2d 476. The respondent has no knowledge of the number of occasions on which Judge Boyer may have entered the court room during the trial of the relator, or the effect of his presence therein on the jury trying the relator, and, therefore, neither admits nor denies the allegation with respect thereto, but, if deemed material and relevant, demands proof thereof at the trial of cause. It is averred, however, that Judge Boyer's presence in the court room during the trial of the relator was neither irregular nor improper and, in no sense of the word, operated to deny the relator due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, in his trial.

The respondent has no knowledge of the truth or falsity of the remarks attributed to Judge Boyer in pronouncing sentence upon a defendant in a wholly unrelated proceeding and, therefore, neither admits nor denies the same, but, if deemed relevant and material, demands proof thereof at the trial of the cause. It is averred, however, that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

12. Denied. On the contrary, it is averred that the relator was not denied any constitutional right on the trial of the indictment eventuating in the judgment and sentence of death. It is further averred that said allegation is irrelevant, immaterial, and not open to inquiry in this proceeding. See paragraph 2 of this Answer which is incorporated by reference herein; *Rakes v. United States* (C. C. A. 4, 1948), 169 F. 2d 739.

13. The respondent has no knowledge of the truth or falsity of this allegation, and neither admits nor denies the same, but, if deemed material and relevant, demands proof thereof at the trial of the cause. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

14. Denied, as averred. It is admitted that the Fourteenth Amendment of the Constitution of the United States forbids the several states from *denying* an accused his right to a fair and impartial trial. It is averred, however, that there is a vast distinction between *denial*—affirmative action by the state— and *failure to enjoy,* which does not invalidate the judgment *(Dorsey v. Gill, supra; Burkett v. Mayo, supra; Hudspeth v. McDonald, supra; Miller v. Hudspeth, supra* and *Farrell v. Lanagan, supra).* It is averred that the said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

15. Admitted.

16. Denied. It is averred, however, that had relator's counsel seasonably presented, as it was their duty to do, the petition to the officials at the Western State Penitentiary, Rockview, it would have been promptly presented to the relator for his execution and just as promptly returned to his counsel.

NEW MATTER.

Further answering the relator's petition, the respondent alleges the following new material.

17. On April 4, 1951, the Supreme Court of Pennsylvania, denied the relator's Petition for a Writ of Habeas Corpus, predicated on substantially the same grounds alleged in this proceeding, a true and correct copy of the

Opinion of said Court being attached hereto, made a part hereof and marked "Exhibit A".

WHEREFORE, the respondent prays your Honorable Court to discharge the rule to show cause and dismiss the Petition for a Writ of Habeas Corpus. And he will ever pray, etc.

.....,

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.

By: .....,

RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } SS.:

Before me, a Notary Public in and for said State and County, personally appeared RANDOLPH C. RYDER, Deputy Attorney General of Pennsylvania, who being duly sworn according to law, deposes and says that the foregoing facts are true and correct to the best of his knowledge, information and belief.

.....,

RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

Sworn and subscribed to before me this....day of April, 1951.

.....,

Notary Public.

My Commission Expires:

10

Office - Supreme Court,
FILED
SEP 17 1953
HAROLD B. WILLEY, C

No. 263

IN THE

Supreme Court of the United States

No. October Term, 1953

JAMES F. MARONEY, Successor to J. W. CLAUDY, WARDEN, Western State Penitentiary,

Petitioner

v.

UNITED STATES OF AMERICA, ex rel. DAVID DARCY,

Respondent

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1953

James F. Maroney, Successor to J. W. Claudy, Warden, Western State Penitentiary
Petitioner

v.

United States of America, ex rel. David Darcy,
Respondent

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of The Supreme Court of The United States:

Respondent respectfully makes answer to the Petition for Writ of Certiorari presented by the Attorney General of Pennsylvania, as follows:

POINT I.

The first point made in the Petition is that this habeas corpus proceeding is a suit against the State of Pennsylvania, to which it has not consented, either ex-

pressly or by implication, and, therefore, the judicial power of the courts of the United States does not extend thereto. It is submitted by Respondent that this is not a proceeding against the State of Pennsylvania, but one directed against the Warden of Western State Penitentiary, at that time J. W. Claudy, now James F. Maroney, in compliance with the requirements of the Habeas Corpus Act of June 25, 1948, c. 646, 62 Stat. 965, (28 U. S. C. A. sec. 2243) "he being the person having custody of the person detained." The Petition for Habeas Corpus included also the Warden of the Bucks County Prison and the United States Marshall for the Middle District of Pennsylvania (T. p. 9).

In *Darr vs. Burford,* 399 U.S. 200, 70 S.C.R. 587-590, it was held by this Court that "The writ of habeas corpus commands general recognition as the essential remedy to safeguard a prisoner against imprisonment by *State* or Nation, in violation of his constitutional rights."

In all of the late decisions of this Court as to the issuance of the writ of habeas corpus in a case where a person is in prison under conviction by a State court, emphasis is placed upon the proposition that the applicant for the writ must have exhausted all of his State remedies *before* he can appeal to the Federal Court. If the proposition advanced by the Attorney General is correct, then the Habeas Corpus Act, which thus permits the issuance of the Writ by a Federal Judge, means nothing. To deprive a person illegally detained of his liberty of the right to raise the question of violation of his constitutional rights, because the

writ must of necessity issue against an official of the State, would leave him no remedy whatever. Should it be urged that the Supreme Court of the United States has the power to grant certiorari in order to bring up the record of the State Court, and thus correct the denial of due process by the State Court, we respectfully refer the Court to the late cases of *Daniels vs. Allen,* 344 U.S. 443, 73 S.C.R. 437, and *U. S. ex rel. Smith vs. Baldi,* 344 U.S. 561, 73 S.C.R. 391, the first of which decides at p. 441 that, "In habeas corpus cases as in others, denial of certiorari cannot be interpreted as an expression of an opinion on the merits," and the second at p. 393, "and denial of certiorari in habeas corpus cases is without substantive significance."

In the opinion by Mr. Justice Frankfurter in the Daniels case, it is expressly pointed out that petitions for writs of certiorari are not usually given that close attention which is required when the violation of a person's constitutional rights is before the court. Therefore, the denial of certiorari after an adverse decision by the State Supreme Court, would mean nothing so far as an adjudication of constitutional rights is concerned. It is obvious, therefore, that the right to such adjudication must be asserted *thereafter* by a proceeding in the Federal Court, as permitted by the Habeas Corpus Act.

In *Georgia Railroad & Banking Company vs. Redwine, State Revenue Commissioner,* 342 U.S. 299, 72 S.C.R. 321, it was contended that the injunctive proceeding was one against the State of Georgia, although the defendant named was the State Revenue Commis-

sioner. This court, in an opinion written by Mr. Chief Justice Vinson, said at page 324:

> "It (the suit) seeks to enjoin appellee from collecting taxes in violation of appellant's rights under the Federal Constitution. This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in Ex parte Young, 1908, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, and have been consistently followed to the present day * * *"

In *U. S. vs. Lee,* 106 U.S. 196, 1 S.C.R. 240, the United States claimed the right to possession of property in Arlington for a cemetery and a fort, which claim was resisted by the private owners of the property. The objection to the suit was that this was an action against the United States and could not be sustained. However, the Supreme Court called attention to the Fifth Amendment to the Constitution, and then said in its opinion at p. 259:

> "These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the ex-

ecutive and the legislative branches of the government. See Ex parte Milligan, 4 Wall. 2, and the case of Kilbourn, discharged from the custody of the sergeant-at-arms of the house of representatives of Chief Justice Carter. Kilbourn v. Thompson, 103 U.S. 168."

It will be noted in the Lee Case that the Court used as an example the habeas corpus proceeding to protect the rights of a prisoner held without due process.

Under the foregoing authorities, as well as many others of this Court, it must be concluded that this habeas corpus proceeding is not such a proceeding against the Commonwealth of Pennsylvania as would oust the jurisdiction of the Federal Court.

Even if it were such proceeding, then we submit that the appearance of the Attorney General, or his Deputy, in this case on behalf of the named Respondent, would amount to a waiver of immunity from suit.

In *Clark vs. Bernard,* 108 U.S. 436, 2 S. Ct. 878, this court said at p. 883:

> "The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the state of Rhode Island on the ground that the suit was in effect brought against a state by citizens of another state, contrary to the eleventh amendment to the constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant

of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. * * *"

In *Georgia Railroad & Banking Company vs. Redwine,* supra, in his concurring opinion at p. 325, Mr. Justice Douglas stated that in his view the appellant's suit was really against the State of Georgia to enjoin a breach of contract, which contract had been involved in the case of *Wright vs. Georgia Railroad & Banking Company,* 216 U.S. 420, 30 S. Ct. 242. Justice Douglas makes this statement:

> "The suit in the Wright case was against a state officer. But the Attorney General appeared and defended the case on the merits. It is clear to me that the Attorney General represented and spoke for the interests of Georgia and the lower court and in this Court."

In the case of *U. S. ex rel. Smith vs. Baldi,* supra, which was a habeas corpus proceeding instituted in the United States District Court for the Eastern District of Pennsylvania, after conviction and death sentence by the State Court, it is to be noted that the attorney for the Respondent was "Randolph C. Ryder, Lan-

caster, Pennsylvania," who was Deputy Attorney General of Pennsylvania and who is the same Deputy Attorney General who has been handling the proceedings relative to David Darcy, and whose name appears on the cover of the Petition for Writ of Certiorari, although the petition is signed personally by Robert E. Woodside, Attorney General.

In *U. S. ex rel. Smith vs. Baldi,* as well as the many other cases which have been presented, the Attorney General or his Deputy, has appeared and protested the issuance of the writ. In the case at bar, no question of jurisdiction was presented either in answer to the Petition for Habeas Corpus presented to the District Court Judge, or in the appeal to the United States Court of Appeals. Certainly, two results are obvious: First, if this were to be construed as an action against the Commonwealth of Pennsylvania, by permitting its chief law officer or deputy to step in and attempt to protect the alleged unconstitutional actions of the State Courts, the Commonwealth waived its privilege of immunity from suit; and secondly, it is too late for the Attorney General to protest that he and his deputies have no authority to represent the Commonwealth of Pennsylvania in a case of this kind.

In answer to the argument as set forth in page 21 of the Petition, that the State's highest court should be subject to reversal only by this Court, we respectfully submit that *Daniels vs. Allen,* supra, decides otherwise. At page 448 it is said:

> "Insofar as this jurisdiction enables federal district courts to entertain claims that State Su-

preme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted."

It is respectfully submitted that the Federal Court had jurisdiction of this habeas corpus proceeding, and, therefore, this Petition for Certiorari should be denied.

POINT II.

Point II raises the question whether or not the District Court abused its discretion in refusing to grant a plenary hearing. Inasmuch as the Court of Appeals did not grant a plenary hearing, but only a hearing on the question of hysteria and prejudice, the argument presented by the Attorney General on this point has no application.

The Per Curiam opinion of the United States Court of Appeals, as relevant to the point under discussion, reads as follows (T. p. 41-42):

> "The majority of the court is of the opinion that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice. See Walker v. Johnson, 312 U.S. 275, 284."

It is respectfully submitted that this finding by the Court of Appeals must be given weight. The court says that David Darcy must be afforded the opportunity to prove the allegations. In Daniels vs. Allen, it is specifically held that if the Record of the State proceedings is not filed, the Judge is required to decide whether to call for the record or to hold a hearing. In the case at bar, the entire record was before the Court and the Court of Appeals found that the undisputed and incontrovertible facts, as shown by the record, do not countervail the allegations of hysteria and prejudice.

As to the proceeding in the court below, the supporting opinion written by Chief Judge Biggs shows that the following transpired (T. p. 43-44):

> "The petition came on for hearing on April 5, 1951, on an order so directing which also stayed

Darcy's execution until the final disposition of the petition by the court below. The Commonwealth moved orally to dismiss the petition as insufficient in law. Leave to file an answer nunc pro tunc was granted to the Commonwealth and an answer was received by the Clerk on April 17, 1951 and was filed by him as of April 3. It will be noted that the answer was filed six days after the court below entered its final order."

The hearing referred to was strictly one of law, and the facts of the petition for habeas corpus should have been taken as true for the purposes of the oral motion to dismiss. Therefore, the District Court was in error in deciding the issue of fact against the petitioner for habeas corpus. The Court of Appeals decided that a hearing must be held on the issue of hysteria and prejudice. This was not error. If David Darcy was, as a matter of fact, tried in such an atmosphere, then he was denied due process as guaranteed by the Fourteenth Amendment to the Constitution, and any judgment based on such trial would be void.

In *Hawk v. Olson,* 326 U.S. 271, 66 S.C.R. 116, it is said at page 118:

"This liberalization of habeas corpus required federal courts, when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process. Frank v. Mangum, supra, 237 U.S. 331, 335, dissent 347, 35 S. Ct. 588, 590, dissent 595, 59 L. Ed. 969. The power was called into play a few years later to examine a state conviction under alleged

community coercion and this Court said that if the facts set out were true, the trial would not support a conviction. Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543."

The position taken by this Respondent in the Court of Appeals was that a plenary hearing should have been granted not only on the matter of hysteria and prejudice, but also on the question whether David Darcy had been adequately represented by counsel, as guaranteed by the Constitution. This Respondent still maintains that the Order and Mandate of the Court of Appeals granting a hearing only on the question of hysteria and prejudice, is not adequate to protect his constitutional rights, but that the second matter also should have been submitted for a hearing. It is obvious, therefore, that an overall consideration of the matter shows no error in the Court of Appeals in reversing the judgment of the District Court in deciding the case without a hearing on any issue.

POINT III.

The third point raised in the Petition for Certiorari is that of doubt whether the State remedies have been exhausted. There is no question that failure to exhaust an available State remedy is a ground for denying a writ of habeas corpus. An attempt must have been made in the State Court to present the claim now asserted in the Federal Court: *Daniels vs. Allen,* 344 U.S. 443, 73 S.C.R. 437, at 444).

After the Supreme Court of the United States had refused certiorari to review the decision of the Supreme Court of Pennsylvania, a petition for habeas corpus was presented to the Supreme Court of Pennsylvania (*Commonwealth ex rel. Darcy vs. Claudy,* 367 Pa. 130, 79 A. 2d 785). In this petition was set up the violation of the Fourteenth Amendment of the Constitution in denying to the defendant due process, by forcing him to trial in an atmosphere of hysteria and prejudice.

After the Supreme Court of Pennsylvania had denied the petition for habeas corpus, a petition for certiorari was presented to your Honorable Court, which petition was refused: 342 U.S. 837, 72 S.C.R. 61. Defendant, therefore, had attempted to have the matter adjudicated in the State Court, but was unsuccessful. The argument by the petitioner that it is doubtful if State remedies have been exhausted, is plainly without merit. We respectfully submit that all state remedies were exhausted.

POINT IV.

This point is to the effect that the qualification of a trial juror many not be probed on habeas corpus. The question before the Federal Court was not whether a juror was qualified, but whether, on account of the activities of Judge Boyer and the very unfavorable newspaper publicity at the time of the trial, David Darcy could have a fair trial as guaranteed to him by the Constitution of the United States. There is no

question but that this is a matter to be decided by the Federal Court.

In conclusion, Respondent submits that the United States Court of Appeals for the Third Circuit did not err in remanding this case for a hearing, and that if it did err, it was in favor of the Petitioner for this Writ in that it denied a plenary hearing to this Respondent, and that the Petiton for Certiorari should be dismissed.

Respectfully submitted,
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